TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1148.

T. P. WINCHESTER, TRUSTEE; W. L. STALEY; E. B. McHENRY, RECEIVER OF ASSETS OF BANK OF WEST TENNESSEE; THE HERNANDO INSURANCE COMPANY; BEN. MAY; S. S. JOBE, ADMINISTRATOR OF S. M. JOBE, DECEASED; AND TAYLOR, JOY AND COMPANY, FOR USE OF W. F. TAYLOR, PLAINTIFFS IN ERROR,

vs.

J. B. HEISKELL, W. L. SCOTT, AND C. W. HEISKELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED OCTOBER 14, 1886.

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a The Petition of T. P. WINCHESTER *et als.*, complainants, in the case of T. P. WINCHESTER *et als. vs.* J. B. HEISKELL *et als.*

To the Honorable J. W. Deaderick, chief justice of the supreme court of Tennessee:

Your petitioners would respectfully represent unto your honor that lately, in the supreme court of Tennessee, there was pending a cause wherein your petitioners were complainants and J. B. Heiskell *et als.* were defendants, in which a final decree was rendered in said supreme court, at the April term, 1886, of said court, against the complainants, your petitioners, and in favor of the defendants in said cause.

They further represent to your honor that in the said cause and proceeding there was drawn in question one of the matters described in the 709th section of the Revised Statutes of the United States, namely, "the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity."

As shown by the record there was a suit pending in the supreme court of Tennessee in 1876, on appeal from the chancery court of Shelby county, wherein Annie L. Jones was complainant and D. H. Townsend was defendant, involving the title to a tract of land lying in Shelby county, Tennessee. The defendants in this suit were the attorneys of D. H. Townsend, the defendant in that suit. In pronouncing its decree, in 1876, disposing of said suit the supreme court of Tennessee declared a lien on the land in controversy in favor of the defendants in this cause for their fees as the attorneys of the said Townsend, and remanded the case to the chancery court of
b Shelby county in order that proper proceedings might be had in said court to enforce said lien on said land. The cause was remanded to the chancery court of Shelby county as directed, and such proceedings were had in said court that the alleged lien was enforced, by a sale of the land in controversy, under a decree of said court, to satisfy said alleged lien, and the defendants in this suit became the purchasers thereof at the amount awarded to them as their fee, and the land was decreed to them.

Before the decree of this court declaring said attorneys' lien, and before the proceedings in said chancery court, the said D. H. Townsend became a bankrupt on his own petition to the district court of the United States for the western district of Tennessee, and the bankrupt proceedings in said court were pending at the time when the decree of this court declaring said lien was entered and while the said proceedings in the chancery court were progressing. Your petitioners claimed that, with the declaration of the lien by this court, under the laws of Tennessee and the decisions of the courts of said State, a suit or legal proceeding was inaugurated to establish and enforce a lien on said property; that the said defendants, Heiskell, Scott & Heiskell, claimed to be lienors on the bankrupt's said property, and asserted and enforced said supposed lien in the State courts, although the said property was, by virtue of the laws

of the United States, in the custody of the bankrupt court. Your petitioners further claimed that, under the provisions of sec. 711 of the Revised Statutes of the United States and under the sections of the said statutes embraced in title "Bankruptcy," LXI, the said supreme and chancery courts of the State had no jurisdiction to declare and enforce said lien, and that said proceedings and
c the authority exercised by said courts were repugnant to said laws of the United States and void. But the decision of the Supreme Court was in favor of the validity of said proceedings and authority of the State courts, and it so appears of record, the said decree of the Court reciting and adjudging as follows:

"The decree heretofore entered in this cause at the present term is modified and amended as follows:

"The Court being of the opinion that this court had jurisdiction in the case of Annie L. Jones *vs.* D. H. Townsend, mentioned and set forth in the record, to declare the attorney's lien in favor of the defendants in this case on the tract of land described in the pleadings, and that the chancery court of Shelby county, Tennessee, had jurisdiction to enforce said lien on said property by the proceedings, decree, and sale as shown in the record, notwithstanding the bankruptcy of D. H. Townsend and the bankrupt proceedings in the district court of the United States for the western district of Tennessee, as shown in the record, and notwithstanding the provisions of the 711th section of the Revised Statutes of the United States, and notwithstanding the provisions of the sections of the said Revised Statutes embraced in title 61, 'Bankruptcy,' the court adjudges that the authority exercised by the State courts in said proceedings is not repugnant to the said laws of the United States. In construing said laws of the United States the Court is of the opinion that under the circumstances of the case, as shown by the record, the said State courts had the jurisdiction to declare and enforce the lien on the land in question, and that under the said proceedings the defendants acquired a good and valid title to the land in contro-
d versy and that that title is not and was not void and a cloud on the complainant's right and title; and the Court doth so order and decree."

Your petitioners therefore pray your honor to endorse an allowance of a writ of error, and that the proper citation be signed by your honor, to the end that the record and proceedings in said cause may be removed into the Supreme Court of the United States, to the end that said error may be corrected.

And your petitioners, as in duty bound, will ever pray.

T. P. WINCHESTER & OTHERS,
By B. M. ESTES, *Their Solicitor.*

e [Endorsed:] In supreme court of Tennessee. T. P. Winchester *et als. vs.* J. B. Heiskell *et als.* Petition for writ of error. State of Tennessee, Jackson: The writ of error prayed for in the within petition is granted and allowed in pursuance of the law in such cases. Jas. M. Deaderick, chief justice supreme court of Tennessee. June 10, '86. Filed June 10th, 1886. Jno. W. Buford, cl'k.

f Supreme Court of the United States.

T. P. WINCHESTER *et als. vs.* J. B. HEISKELL *et al.*

Know all men by these presents that we, T. P. Winchester, trustee; Hernando Insurance Co., E. B. McHenry, receiver of Bank of West Tennessee, & others compl'ts in the suit of T. P. Winchester *et al. vs.* J. B. Heiskell *et al.*, are held and firmly bound unto J. B. Heiskell, W. L. Scott, & C. W. Heiskell, constituting the firm of Heiskell, Scott & Heiskell, in the sum of five hundred dollars, to be paid to the said J. B. Heiskell, W. L. Scott, & C. W. Heiskell, executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 10th day of June, 1886.

Whereas the above-named T. P. Winchester, trustee; the Hernando Insurance Co., E. B. McHenry, receiver of Bank of West Tennessee, & others, compl'ts in the suit, have prosecuted a writ-of-error appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the supreme court of the State of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named T. P. Winchester, trustee; the Hernando Ins. Co., E. B. McHenry, receiver of Bank of West Tennessee, & others, complainants in the said suit, shall prosecute their said writ-of-error appeal to effect and answer all costs, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

T. P. WINCHESTER, *Trustee*, [SEAL.]
& OTHER COMPLAINANTS.
By B. M. ESTES, *Att'y.*
E. B. McHENRY, [SEAL.]
Receiver Bank West Tenn.
HERNANDO INSURANCE CO., [SEAL.]
By S. H. —— ——, [Name illegible] *Pt.*
E. B. McHENRY, *Surety.*
S. H. —— ——, [Name illegible] *Security.*

Acknowledged and approved before me this 11 day of June, 1886.
[Seal of the Circuit Court of the United States for the District of West Tennessee.]
W. B. WEISIGER,
D. C. U. S. Cir. C't, W. D. T.

g [Endorsed:] Supreme court of Tenn. No. —. T. P. Winchester *et al. vs.* J. B. Heiskell *et al.* Appeal bond. Writ-of-error bond to United States Supreme Court. Filed the 10th day of June, A. D. 1886. Jno. W. Buford, clerk.

Approved June 10, '86.
JAS. W. DEADERICK,
Chief Justice of Supreme Court of Tennessee.

h The President of the United States to the honorable the judges of the supreme court of Tennessee, Greeting:

Because in the records and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between T. P. Winchester, trustee; W. L. Staley, E. B. McHenry, receiver of the Bank of West Tennessee; Hernando Insurance Co., Ben. May, S. S. Jobe, adm'r of S. M. Jobe; D. W. Taylor, Joy & Co., for use of W. F. Taylor, & J. B. Heiskell, W. L. Scott, and C. W. Heiskell, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein a title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, or commission or authority, a manifest error hath happened, to the great damage of the said T. P. Winchester and others, the complainants in said cause, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein

i given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday in October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 10th of June, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the Circuit Court of the United States for the District of West Tennessee.]

BELL W. ETHERIDGE,
Clerk U. S. Circuit C't, W. D. T.

j [Endorsed:] In the supreme court of Tennessee. T. P. Winchester *et als. vs.* J. B. Heiskell *et als.* Writ of error. Allowed by Jas. W. Deaderick, chief justice supreme court of Tennessee. June 11, '86. Rec'd & filed June 15, 1886. Jno. W. Buford, cl'k.

k *Citation.*

The United States of America to J. B. Heiskell, W. L. Scott, and C. W. Heiskell, defendants in the cause of T. P. Winchester *et als. vs.* J. B. Heiskell *et als.*, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Tennessee, wherein T. P. Winchester *et als.* are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the decree rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James W. Deaderick, chief justice of the supreme court of Tennessee, this 10th day of June, in the year of our Lord one thousand eight hundred and eighty-six.

JAS. W. DEADERICK,
Chief Justice Sup. C't of Tennessee.

l [Endorsed:] In supreme court of Tenn. T. P. Winchester *et als. vs.* J. B. Heiskell *et als.* Citation. Due & legal service of the within citation acknowledged this June 15th, 1886. Crupp & Turley, att'ys for Heiskell, Scott & Heiskell, def'ts in error. Filed June 18th, 1886. Jno. W. Buford, cl'k.

1 Chancery Court of Shelby County.

STATE OF TENNESSEE, *Shelby County:*

Pleas before the Hon. W. W. McDowell, chancellor of the chancery court of Shelby county, held in Memphis and State and county aforesaid, and at the April term thereof, 1881.

Be it remembered that heretofore, to wit, Feb'ry 12, 1880, T. P. Winchester *et al.* filed their bill of complaint against J. B. Heiskell *et al.* in words and figures —, to wit:

Original Bill.

T. P. WINCHESTER, Trustee; W. S. STALEY, E. B. MCHENRY, Receiver of the Assets of the Bank of West Tennessee; The Hernando Insurance Company of Memphis; Ben. May, S. S.
2 Jobe, Adm'r of S. M. Jobe, Dec'd; Taylor, Joy & Co., for use of W. F. Taylor, all citizens of Shelby county, Tennessee, except Ben. May, who is a resident of St. Louis, Missouri, Complainants,

vs.

J. B. HEISKELL, WM. L. SCOTT, & C. W. HEISKELL, Late Partners in the Practice of the Law under the Firm Name of Heiskell, Scott & Heiskell, and all residents of Shelby county, Tennessee, except the said Scott, who resides in St. Louis, Missouri.

To the Hon. W. W. McDowell, chancellor of the chancery court of Shelby county:

Complainants respectfully represent to your hon. that on the 18th

of June, 1875, D. H. Townsend, of Shelby county, executed and delivered his trust deed of that date to George W. Winchester, trus-
3 tee, whereby he conveyed certain real estate therein mentioned and described in trust for the purposes and upon the trusts therein set forth. Said original trust deed is herewith filed as a part of this bill, marked Exhibit A 1, but not to be copied. By reference to said trust deed it will be seen that the property described therein is conveyed by the grantor, Townsend, to the trustee, Geo. W. Winchester, to indemnify and protect complainants, May & Staley, against the payment of certain obligations therein mentioned, upon which they were respectively bound, as the endorser and surety of the said Townsend, to secure the payment of said obligations. Some of the notes mentioned in said trust deed have been paid, but the following of them remain due and unpaid, and
4 compl't, Ben. May, is legally liable for the payment thereof, such liability having been fixed by due demand of payment and notice of dishonor, or by other legal means, viz: "The note due the Hernando Ins. Co. on 21st July, 1875, for the sum of $2,500; the note due the Hernando Ins. Co. on the 16th June, 1875, for the sum of $1,153.71, which is now (at the date of the trust deed) renewed for a period of 60 days, for the sum of $—; the note due the Hernando Ins. Co. on 8th July, 1875, for the sum of $1,500; the note described as held by Judge Ellett, due July 15, 1875, in the sum of $1,000, which note is now held and owned by compl't, S. S. Jobe, administrator of the goods & chattels, rights & credits of S. M. Jobe, dec'd. The note described as held by the Planters' Insurance Co. has been paid in part, and the balance is
5 secured outside of the trust deed and no relief is asked for in this suit by said Co. All the balance of the notes described in the trust deed as being indorsed by compl't may have been paid off and satisfied by him as accommodation endorser of the said Townsend, and the amounts thus paid have never been refunded to him. The note for $526.41, due 4th Nov., 1874, described in said trust deed as having been taken up by compl't May as indorser of said Townsend, also remains due and unpaid. The indebtedness therein secured to Taylor, Joy & Co. is still due and unpaid and is now owned by W. F. Taylor. Compl'ts, W. S. Staley and E. B. McHenry, receiver of the Bank of West Tennessee, further show that on 9th Dec'r, 1873, a decree was pronounced in this hon.
6 court, in obedience to the *procedendo* of the supreme court of Tennessee, against D. H. Townsend and compl't Staley, as his surety on the appeal bond mentioned in the trust deed, for the sum of $6,844.51, in the case of Marr *et al. vs.* Bank of West Tennessee *et al.*, and this decree remains in full force, unreversed and unpaid. Compl't McHenry is the duly appointed receiver of the assets of said bank by appointment of this hon. court in the cause above mentioned, and as such is entitled to sue for and recover said decree, with interest and costs, as will appear by reference to the record in that suit. After the execution, delivery, and registration of said trust deed, and on 28th Nov., 1875, the said D. H. Townsend filed a petition in bankruptcy in the

district court of the United States for the western district of
7 Tennessee, and on 30th November, 1875, he was duly adjudicated a bankrupt by that court. This application for a discharge in bankruptcy is now pending, and the same will be granted at an early day. In December, 1877, Geo. W. Winchester, the trustee in said trust deed, departed this life before he had executed the trusts of the deed, and on 21 April, 1879, by decree of this hon. court in the cause recently pending herein, wherein Ben. May *et al.* were petitioners and T. P. Winchester *et al.* were def'ts, the complainant, T. P. Winchester, was appointed trustee in said trust deed in the room and stead of the deceased trustee, and duly invested with the title to the property therein described and all the powers therein granted.

8 Complainants here make reference to the record and decree in said cause, which is No. 3225 on the rule docket of the court.

Complainant Winchester, as trustee, has recently sold at public auction, in pursuance of the trusts and powers of said trust deed, all of the property conveyed therein, except the one tract of land which is described as follows: Beginning at the same point first ascertained in the trust deed; thence westwardly 106 chains & 1 link to a stake; thence northwardly 60 chains 37 links to the northern boundary line of the Wm. Lyttle 2,250-acre tract of land; thence eastwardly with said northern boundary line 57 chains 57 links to a stake; thence N. 78° E. 9 chains 80 links to a stake; thence
9 eastwardly with said north boundary line 38 chains 90 links to the west boundary line of grant No. 16884; thence southwardly with said west boundary 61 chains 87 links to the beginning, it being the 646-acre subdivision of the Wm. Lyttle tract of 2,250 acres, the same formerly owned by Wm. Jones, and on the eastern part of which the dower of Annie L. Jones was laid off. The property thus sold only realized about the sum of $2,500.00 as the nett amount to be credited on the debts secured in the trust deed, and compl'ts believe and charge that the whole of said property when disencumbered and sold will not be adequate and sufficient to pay off the liability secured in said trust deed and yet outstanding and unpaid. The last hereinbefore-described tract of land remains un-
10 sold because the defendants, Heiskell, Scott and Heiskell, are in the possession thereof, claiming the title thereto adversely to the complainants. As complainants are informed & believe the def'ts claim to be the owners of said tract of land under the following proceedings and state of facts, viz: Prior to 16th day of February, 1869, D. H. Townsend had recovered a judgment against one Wm. E. Jones for the sum of eleven hundred and eighty-eight $\frac{25}{100}$ dollars, had cause- an execution issued on said judgment to be levied on the said tract of land as the property of said Jones, and at the execution sale had purchased the land at an amount equal to his debt, interest, and costs. The property was conveyed to him by sheriff's deed, and under this deed he claimed title to it. On the 16th February,
11 1869, Annie L. Jones and others, the widow and heirs-at-law of Wm. E. Jones, filed their bill in the chancery court of Mem-

phis against D. H. Townsend, seeking to have the said sheriff's deed cancelled and the compl'ts in said suit quieted in their title and possession. On 17th February, 1869, the def't Townsend filed his answer and cross-bill in said suit. In the answer the material allegations of the bill are denied, and by the cross-bill an injunction is prayed for to prevent the compl'ts from further committing, waste, or taking further possession or making inclosures, &c., &c. In the answer it is expressly alleged that the def't, by virtue of his ownership, was "in the actual possession of the land" and "in the
12 occupation of the same by his tenants and agents, and had been for some time in the past, being in the actual possession of the part outside of what is claimed as the dower boundaries, and was exercising acts of ownership upon the land, as he was advised he had the perfect right to do, &c." By the answer it was, in substance, admitted that under proper proceedings dower had been assigned to the widow; that the part of the land thus assigned included the mansion house, and that the widow was in possession of that. The def't did not contest the widow's dower rights in the suit. By the provisions of the final decree of the chancery court in said cause it is ordered that "the clerk & master of this court will issue a writ of possession directing
13 the sheriff to put compl'ts in possession of said 640 acres of land particularly described in said decree of the 18th July, subject to Townsend's right to remain in possession of the widow's dower, which it appears to the court that Townsend has purchased pending this cause." So it seems that at the date of this decree the def't Townsend was in the full possession of the whole of said tract of land and held the dower interest of the widow by purchase *pendente lite*. This decree was entered on 5th March, 1872, in favor of the compl'ts in the suit. From the decree the def't Townsend prayed and obtained an appeal, on the date of its entry, to the supreme court of Tennessee and duly prosecuted said appeal.
14 Such proceedings were had in the supreme court at Jackson that on 8th Dec., 1876, that court pronounced its decree reversing the decree of the chancellor and settling "that none of the objections taken by the compl'ts to the sheriff's sale in the pleadings mentioned, at which the def't Townsend became the purchaser, are of any force or validity, and that the said Townsend, by his said purchase and the sheriff's deed thereunder, acquired a good and valid title to the tract of land of 640 acres bought thereat. * * * And the court being further of opinion that the said compl'ts are not entitled to redeem the said tract of land, but that the title to the same had, at the time of the filing of compl'ts' bill, become indefeasible, it is, therefore, ordered, adjudged, and
15 decreed by the court that the comp'lts are not entitled to the relief prayed for in their several original and amended or supplemental —, and the same are hereby dismissed, &c."

After thus adjudicating and fully settling that def'ts' title at the institution of the suit was perfect and indefeasible; that all the claims of title set up by the compl'ts were invalid, and dismissing the compl'ts' original and supplemental bills, and thereby in fact and

in substance disposing of all the matters in litigation, the decree of the supreme court proceeds to declare upon the cross-bill that the def't Townsend had a good title to the land in controversy. Complainants further represent to your honor that, for the purpose of "taking order" by the chancery court in reference to a
16 fund deposited in said court for the redemption of the land in controversy, the cause was by the provisions of said decree of the supreme court remanded to this hon. court, where it was pending until the final disposition thereof, as hereafter shown. The said decree contains also the following clauses: "And it being suggested to the court that pending the proceeding in this court the title of the said Townsend has been assigned to Thomas S. Winchester, assignee in bankruptcy, it is, with the consent of the said Townsend, by his counsel, ordered that the said Winchester be made a party to this decree, and by consent this cause is remanded to the chancery court of Shelby Co. to take order in relation to the fund
17 above named and to take an account and make a report of the reasonable counsel fee of the counsel, Heiskell Scott and Heiskell, for which a lien is hereby declared on the premises in conversy, the said Winchester asking that said account be taken below."

The case having been remanded, this court, on 19 Dec., 1876, made an order of reference requiring the master to report "what should be allowed Messrs. Heiskell, Scott & Heiskell, as attorneys for def't in this cause in the chancery and supreme courts." On the 17th February, 1877, the master reports that he had taken proof, &c., and that he found that Messrs. Heiskell, Scott & Heiskell are entitled to a fee of $5,500.00 for services rendered the def't in the chancery & supreme courts. On 16 March, 1877, this report
18 (unexcepted to) was confirmed, and, after crediting $200 which had been paid the counsel by Townsend, the fee was fixed and the lien declared on the land to secure $5,300. On 10th July, 1877, a decree of this court was entered which ordered the master to sell said tract of 640 acres of land at public auction for cash to pay said fee of $5,300. This decree provided "that if the firm of Heiskell, Scott & Heiskell, or either of them, became the purchaser they shall only be required to pay the amount of said bid over and above the amount of said fee." On 13th Oct., 1877, the master reports that he had offered said property for sale, as required by the decree, when Messrs. Heiskell, Scott & Heiskell became the purchasers at the sum of $5,300. On 26th Oct., 1877, the sale was con-
19 firmed, and "all the right, title, & interest of D. H. Townsend or his assignee in bankruptcy, T. P. Winchester, or of any party or parties complainant or def't in and to this land" was divested out of them and vested in said Heiskell, Scott & Heiskell.

Thus ended this litigation, the result of which was that the counsel of def't became vested with the title (so far as it could be legally vested in them in that cause) to the whole tract of land for their fee in defending Townsend's title to the land. From the record in the cause it appears that witnesses introduced by the counsel before the master to prove the value of this land testify that it was worth in Jan'y, 1877 (a short time before the purchase by the said

counsellors), from $40 to $50 per acre—from $2,600 to $3,300.
Compl'ts insist that the principles upon which learned lawyers (who are introduced in said reference) estimated the value of said professional services were incorrect and should not have been adopted by the court. These considerations are immaterial, perhaps, in this suit, but compl'ts are advised that under the laws and decisions of Tennessee the said counsellors had no lien on said property and were not entitled to have a lien declared thereon; that by the litigation they recovered no property, but simply protected an existing title for their —. They charge, upon positive information derived from D. H. Townsend, that he had no notice or knowledge of the purpose of the def'ts in this suit to claim and have declared a lien on said property and was totally ignorant of such purpose and of the decree declaring the lien until after the case was remanded to the chancery court. In fact the decree on its face negatives the idea of such notice or knowledge and does not purport that the counsellors instituted proceedings against their client to enforce a lien, as by law they were required to do. But independently of this the fact at the date of said decree was and the decree itself shows that before that time D. H. Townsend had been adjudicated a bankrupt, and that such title to the land in question as remained in him after the date of the trust deed to Geo. W. Winchester had been assigned in bankruptcy to his assignee. Compl'ts are advised that the only right or title to the land that remained in said Townsend after said trust deed was executed and delivered, and that passed to his assignee in bankruptcy, was a contingent interest under the trust deed, and this was the only right that said assignee represented or could represent in said suit. He was in no sense the representative of the trustee or *cestui que trusts* in said trust deed. Compl'ts are advised and insist that under the circumstances of the case the decree of the supreme court, so far as it declares a lien for counsel fees on said tract of land, is no estoppel by judgment upon them and they are in nowise bound thereby; that neither they nor the interest in said land that they represented were before the court when said decree was pronounced and they had no representative before said court. The suit was not revived or reinstated in their names or in the name of the trustee after Townsend's bankruptcy and the assignment of his assets in bankruptcy. After these acts the said Townsend did not stand, as before, the representative of the suit of the *lis pendens* purchaser, and if, indeed, it could be held that he did, neither he nor the said purchasers are bound by the adverse proceedings instituted by his solicitors to fasten a lien on the property that was the subject of the litigation without notice to him or them. Even the said Townsend is protected under the constitution and laws of Tennessee and of the United States from having this property taken "without due process of law," and, inasmuch as he has never had his day in court or an opportunity to defend against the claim set up against him by his solicitors, it follows that he is not bound by the judgment of the court, and, *a fortiori*, the compl'ts are not bound thereby. By the provisions of the trust deed to

G. W. Winchester the equity of redemption was waived and the assignee in bankruptcy did not even represent the equity of redemption in said property. Compl'ts further charge, upon the positive statement of D. H. Townsend and corroborated by the statement of compl't Staley, another witness, that the def'ts contracted
25 and agreed to defend said suit for a fee of one thousand dollars, and were not to charge more for their services.

Complainants now represent to your honor that during the pendency of the suit of Jones *vs.* Townsend and since the def'ts to this suit took possession of said property a large amount of taxes to the State and county have accumulated upon it, and the title is endangered thereby. The def'ts are now enjoying the use and occupation of said property without paying the accruing taxes, and it is absolutely essential to the interests of the parties to this litigation that a receiver be appointed to take possession of the property, rent it out, and devote the rents to the payment of past and accruing taxes.

While the title to said property is clouded with def'ts' claim
26 and decree it would be impossible for compl't Winchester, as trustee, to sell the property except at a ruinous sacrifice; hence it is indispensable that the cloud on the title should be removed. The premises considered compl'ts pray that the parties named in the caption as def'ts be made def'ts to this bill; that process of subpœna and copy of bill issue to the resident def'ts, and publication be made to the non-resident def'ts requiring them to plead, answer, or demur to this bill by the March rules, 1880; that a receiver of said property be appointed for the purposes indicated in this bill; that all proper interlocutory orders and references be made and had, and that on final hearing a decree may be made pronouncing the claim of
27 title set up by the def'ts invalid and a cloud upon compl'ts' title to said tract of land; also removing their said pretended title as a cloud upon compl'ts' title and delivering the possession thereof to compl't Winchester, in order that he may proceed to sell said property unencumbered and execute the trusts of the conveyance to him, and for all other and further relief; and, as in duty bound, compl'ts will ever pray.

ESTES & ELLETT,
Sol's for Compl'ts.

STATE OF TENNESSEE, *County of Shelby:*

Personally appeared before Robert J. Black, clerk & master of the chancery court of Shelby county, —— ——, who made oath in due form of law that the statements made in the foregoing bill
28 as of his own knowledge are true, and those made upon information he believes to be true.

S. H. DUNSCOMB.

Sworn to & subscribed before me this 12 day of Febr'y, 1880.
R. J. BLACK, *C. and M.*

(EXHIBIT.)

Trust Deed. D. H. Townsend to Geo. W. Winchester.

STATE OF TENNESSEE, *County of Shelby:*

Know all men by these presents that, for and in consideration of the sum of five dollars to me in hand paid by Geo. W. Winchester, the receipt of which is hereby acknowledged, and the other considarations hereinafter expressed, I have this day bargained and sold, and do by these presents bargain and sell, enfeoff, alien, con-
29 vey, and confirm, unto the said Geo. W. Winchester the following tracts or parcels of land situate in the county and State aforesaid, and in the 13th civil district of said county, and more particularly described as follows

One tract being in section (1) one, range (8) eight, of the 11th surveyor's district, beginning at a stake on the west boundary line of grant No. 16884, the southeast corner of D. H. Townsend's 646-acre tract; thence north with the west line of said grant No. 16884 forty-two chains 25 links to the center of — creek, with elm pointers marked D on the south bank of said creek; thence up said creek, with the center thereof, N. 84° 30′ E. 4 chains 30 links, N. 74° E. 2 chains 65 links, N. 52° 30′ E. 6 chains 85 links, S. 83° E. 2
30 chains 65 links, S. 60° E. 4 chains 13 links, S. 43° E. 3 chains 3 links, S. 4° 30′ W. 1 chain, S. 33° W. 3 chains 78 links, S. 5° E. 4 chains 25 links, S. 14° 30′ W. 1 chain 47 links, S. 52° 30′ W. 1 chain 78 links, S. 80° W. 2 chains 8 links, S. 37° W. 3 chains 74 links, S. 6° W. 3 chains, S. 2° E. 1 chain 55 links, S. 42° E. 3 chains 55 links, S. 79° E. 2 chains 70 links, S. 85° 30′ E. 3 chains 52 links to a stake in the center of said creek with black gum on the south bank of said creek 7 links west of line marked T, one black gum 22 links east of line marked M; thence S. 45° W. 34 chains 75 links to a small black gum; thence west 3 chains 75 links to the beginning, containing 100 acres, being the same conveyed by Peter Mitchell to me on the 25th day of Jan'y, 1870, and duly recorded in the register's office of Shelby county, in book 74, page 189; also one other tract
31 beginning at the same point with the tract first described; thence westwardly 106 chains & 1 link to a stake; thence northwardly 60 chains 37 links to the northern boundary line of the Wm. Lyttles 2,250-acre tract of land; thence eastwardly with said northern boundary line 57 chains 57 links to a stake; thence N. 78° E. nine chains 80 links to a stake; thence eastwardly with said north boundary line thirty-eight chains 90 links to the west boundary line of grant No. 16884; thence southwardly with said west boundary 61 chains 87 links to the beginning, it being the 646-acre subdivision of the Wm. Lyttle tract of 2,250 acres, the same formerly owned by Wm. Jones, and on the eastern part of which the dower of Annie L. Jones was laid off; also an undivided
32 one-fourth interest of the lot of ground situated on the southeast corner of Main & Beal streets, in the city of Memphis, known as the McManus property, and beginning for the boundaries of said entire lot at the southeast corner of Main and Beal; thence

south 82 feet front on Main St. to Townsend's line; thence east with said line 175 feet to Mulberry street; thence northwardly with the west line of Mulberry St. 116 feet to Beal St.; thence westwardly with south line of Beal street 175 feet to the beginning. To have and to hold said two tracts of land, and the undivided interest hereinbefore described, with all the hereditaments and appurtenances thereunto belonging, to the said Geo. W. Winchester, his heirs & assigns, forever; and I covenant for myself, heirs, executors,
33 and administrators that I am seized of the said tracts of land and undivided interests in the lot of ground aforesaid; that I have a good right to convey the same; that they are unencumbered, and that I will warrant and defend the title to the said Geo. W. Winchester, his heirs and assigns, forever, against the lawful claims of all persons whomsoever.

This conveyance, however, is in trust for the following uses and purposes and none other—that is to say: Whereas Ben. May is bound for me as endorser upon the following-described notes and bills, to wit: One note due the Hernando Ins. Co. on the 16th June, 1875, for the sum of $1,153.71, which is now renewed for a period of sixty days for the sum of $1,153.71; one due the 4th National Bank
34 on the 29th June inst. for the sum of $125.00; one due the Hernando Ins. Co. on the 8th of July, 1875, for the sum of $1,500; one due Taylor, Joy & Co. on the 10th of July, 1875, for the sum of $284.00; one due the Hernando Ins. Co. on the 21st July, 1875, for the sum of $2,500; one due P. Tuggh June 28, 1875, for the sum of $700.00; one due S. M. Jobe, July 30, 1875, for the sum of $150.00; one due the Planters' Ins. Co. on the 4th Aug., 1875, for the sum of $1,250.00; and whereas I am also indebted to Ben. May in the further sum of $526.41, by note held by him due on the 4th Nov., 1874, being a note taken up by him as endorser, and he is also bound as endorser for me on a note held by Judge Ellett due July 15, 1875, in the sum of $1,000; and whereas also W. S. Staley be-
35 came bound as my surety on an appeal bond in the case of Marr *et al. vs.* The Bank of West Tennessee, in the 1st chancery court of Shelby Co., in the sum of about $8,000, and being desirous to indemnify and save harmless the said May and Staley from the liability thus incurred as surety and endorser: Now, if said parties shall be constrained to pay off and discharge any of their liabilities, and I shall fail to reimburse the amounts thus paid within a period of two years from the date of these presents, then I authorize and empower my trustee hereinbefore named, after giving 20 days' notice in some newspaper published in the city of Memphis, to expose at public auction to the highest bidder for cash the property
36 hereinbefore described, making said sale in front of the Planters' Insurance Co. building, No. 39 Madison street, city of Memphis, and to sell the same or so much as may be necessary to raise the money adequate for the payment and discharge of such liabilities. The trustee will apply the proceeds of this sale—1st, to the payment of the costs of exeeution of this trust; 2nd, to the payment of these liabilities or such as have accrued and fallen upon such endorser and surety, it being intended to place them both on

an equal footing; and lastly, to pay the remainder, if any, to me; and I hereby waive the equity of redemption in the event a sale of the property should become necessary and intend that the sale made under the power herein conveyed shall convey to the purchaser
37 an absolute estate. I also waive the necessity of the trustee executing bond and of the administration of the oath required by law.

In testimony whereof I have hereto set my hand and seal this 18th June, 1875.

D. H. TOWNSEND. [SEAL.]

STATE OF TENNESSEE, *Shelby County:*

Personally appeared before me, C. Reilly, deputy clerk of the county court of said county, D. H. Townsend, the within-named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand, at office, this 18th day of June, A. D. 1875.

C. REILLY,
Dep't Clk.

STATE OF TENNESSEE, *Shelby County:*

38 The foregoing instrument, with clerk's certificate, was filed in my office for registration on the 18 day of June, 1875, at 3.20 o'clock p. m., and noted in note-book No. 8, page 146, and was recorded on the 18 day of June, 1875, in record book No. 107, page 241.

H. W. GRIEBEL, *Register.*

Cost Bond.

We, T. P. Winchester *et al.*, and s'ty, S. H. Dunscomb, acknowledge ourselves indebted to J. B. Heiskell *et al.* in the sum of two hundred and fifty dollars, to be void if the said T. P. Winchester *et al.*, complainants in a bill which has this day been filed in the chancery court of Shelby Co. against the said J. B. Heiskell & *al.*, shall pay all such costs as may be awarded against them by the court
39 in its decrees and orders in said cause.

This 12 day of Feb'ry, 1880.

HERNANDO INS. CO.,
By S. H. DUNSCOMB, *Pres't.*
S. H. DUNSCOMB.
BANK OF WEST TENN.,
By E. B. McHENRY,
Receiver.

Answer of All the Defendants. Filed June 8, '80.

T. P. WINCHESTER, Trustee; W. S. STALEY, E. B. McHENRY, Receiver of the Assets of the Bank of West Tennessee; The Hernando Insurance Co. of Memphis, Ben. May, S. S. Jobe, Adm'r of S. M. Jobe; Taylor, Joy & Co., use of W. F. Taylor, Complainants,

vs.

J. B. HEISKELL, W. L. SCOTT, & C. W. HEISKELL, Firm of Heiskell, Scott & Heiskell, Respondents.

40 Respondent, saving and reserving the usual exceptions to so much of said bill as they are advised it is material for them to answer, answering say:

They admit the execution of the deed of trust in the bill mentioned by D. H. Townsend to Geo. W. Winchester, trustee on the land in controversy on the 18th day of June, 1875; but from an inspection of said trust deed it will be seen that other lands of great value were also conveyed to secure the parties therein named, the value of which respondents aver was sufficient, as respondents charge, to pay off all of the real debts and liabilities therein secured. They further charge that said other lands were sold without authority of law and for mere nominal prices, and they
41 ask that complainants be compelled to exhibit the proceedings under which said sales took place, so that respondents can advisedly object to the same, which they cannot do without this, as they were no party to those proceedings and had no legal notice of the same, and so, for want of information, they cannot point out the defects. But in order that their rights in the premises be fully protected they ask that said sale be set aside as improperly made and made without legal authority, as they may show when the proceedings under which the sales took place are submitted for their inspection, and that the same may be resold, so that there can be something made out of them commensurate with their real value; but this they ask only in the event the
42 court should decree against them in this cause, and subject the land in controversy to the payment of a larger amount than these lands really sold for.

For further answer respondents say they deny that there is anything due either Ben. May or Staley, as alleged in the bill, and they call for strict proof, and they charge that all liability of said Townsend to said May & Staley have been long since fully discharged. They also charge that the amounts claimed are very largely in excess of the true amout really due, if anything is due, to the said May, because, as they are informed and believe, said liability of said May grew out of the endorsement by him of said Townsend's notes for money borrowed from the Hernando Ins. Co., which
43 notes are very largely tainted with usury. They therefore call for strict proof on all of these points and ask the court to purge said claim of all usury, and, as they were no party to the transaction, and therefore cannot know the amount of said usury, they ask that the notes in the bill mentioned be filed for their inspection,

and that the complainants make strict proof of their claims. As to the amount claimed by S. S. Jobe, ex't'r of S. M. Jobe, dec'd, respondents charge that it was for loaned money, and they are informed and believe has been fully paid, and, if they are mistaken in their information, they charge the same to be largely usurious, and also that the same was transferred to the said S. M. Jobe long after
44 the rights of respondents accrued, the same being overdue at the time of the transfer; and, further, they are advised that said Jobe has no claim on the land in controversy on the footing of said note in any manner whatsoever, and they call for strict proof of this claim. As to the claim of W. S. Taylor respondents know nothing, and require strict proof of the same. As to the claims of the Hernando Insurance Co. they know nothing except upon information, and upon information they make the same charges in all repects as to this as to the claims of said May, and indeed are advised that they are the same claims, and they ask for strict proof as to the validity of their claims, as they are informed and believe them to be, if not paid in full, largely usurious; and, further, that the said company has no
45 claim whatever against the said real estate here in controversy. As to the claim of said Staley they are advised that he has never paid one cent on the footing of such liability, nor has May on his liability, and respondents deny all allegations to the contrary in the bill. It will be seen by reference to said deed of trust that its provisions are to secure them (May & Staley) "the payment of their liabilities or such as have accrued and fallen upon said endorser and surety," it being intended to place them both on an equal footing, and respondents are advised that under the deed of trust they were duly secured in such amounts as they had paid; and not having paid one cent, and being insolvent, they never will pay
46 anything, or, at all events, their rights under the deed will not accrue until they do pay. Respondents are advised and so charge, further, that the deed was personal to said May & Staley and that no one but them can claim the benefits thereof, and they only in an event which has not happened and never will happen, to wit, in the event they pay the liabilities against them on account of said suretyship or endorsement and to secure them such sums only as they have actually paid. This intention is most clearly set out and declared in the condition of the deed of trust in these words: "Now, if the said parties shall be constrained to pay off and discharge any of these liabilities, and I shall fail to reimburse the amounts thus paid within a period of two
47 years from date, then I authorize & empower," &c., and therefore respondents say that neither May nor Staley have any claim or lien on said land or interest in the same, nor has the said E. B. McHenry, receiver of the assets of the Bank of West Tennessee, whose rights depend upon said Staley's, and this upon the hypothesis that the trust deed is valid as against these respondents in favor of said Staley. Respondents deny each and all of these claims; that they are claims against them and superior to their lien and title to said land. Respondents admit the death of Geo. W. Win-

chester, trustee, and the appointment of T. P. Winchester, but they do not admit the regularity and validity of the proceedings
48 under which this appointment was made, and call for proof on this point. It is true, as stated in the bill, that these respondents do claim the title in fee to said land in controversy, and their title accrued as follows:

In the year 186- the said David H. Townsend employed these respondents to attend to his interest in a controversy then existing between him and one Annie E. Jones, the widow and the heirs of W. E. Jones, dec'd. This employment took place some time prior to the year 1868; but respondents, each of them, most emphatically deny that there was any agreement between them and the said Townsend as to the amount of said fee. They especially deny that there was an agreement to take $1,000.00 for their services, and if it made
49 any difference whatever in the determination of the questions involved in this controversy, which respondents are advised it does not, in view of the facts hereafter to be stated, respondents would state that they always regarded it a very doubtful case, and as the amount involved was then regarded as very large, the land being claimed to be worst from $30,000.00 to $50,000.00, and as their client, Townsend, had not paid more than some $3,000.00 for it, and as the case required great professional labor both in respect to the facts and the legal questions involved, and was most ably and zealously conducted by counsel for *the* Jones and the creditors, they always felt and so expressed themselves in
50 their consultations as to the fee that if they gained the land they would be entitled to a very liberal fee, especially as their client never, through the whole litigation, paid them one cent in money, but did from time to time furnish respondent W. L. Scott with $200 worth of fire-wood off the land, and respondents say it would have been the height of folly in them, or either of them, in such a case to agree to a thousand-dollar fee when they never, for one instant, felt that in case they were successful in the litigation they would settle with their client for less than several times that amount; but when they found that their client would, in any event, lose the whole benefit of the recovery, and that others, his creditors in bankruptcy, would reap the benefits of
51 respondent's labor, they felt they would let the court fix their fee, and that whatever was fixed they would take. But to return to the time of their employment, respondents state that their recollection is, and of this they are positive, that when they were employed D. H. Townsend had procured the land to be sold under an execution at law for some $1,168 upon a judgment obtained by him against W. E. Jones, who owned the 646 acres of land in controversy, and at the sale he, the said Townsend, had bought in the land for said judgment. When he came to consult respondents the time of redemption was about expiring and he desired to know how he should proceed to get possession of the land and
52 perfect his title to the same under his purchase. In the consultation it was developed that Mrs. Jones, the widow, was in possession of the homestead and some acres of land under

fence and in cultivation. Respondents advised him to put some responsible man in possession of all of the unenclosed land, the time for redemption having expired, and said Townsend did put one Thomas Farrar in possession of the enclosed land, together with W. W. Etter, whom respondents recommended as a proper man to do what was required. Said Etter, being put in possession by said Townsend as his tenant, held the possession during the whole litigation. This was the first step in obtaining possession
53 and towards the recovery by said counsel of said land, and it was taken by advice of respondents and at a time when said Townsend was out of possession of all and every part thereof. Shortly after this Mrs. Annie L. Jones and the children of W. E. Jones filed their bill of injunction against Townsend, claiming that as the widow and heirs-at-law of W. E. Jones, dec'd, they were entitled to the property. The bill was filed by them for themselves and on behalf of creditors of said Jones. The bill further claims that Townsend has, by his agents and tenants, intruded himself upon the property. It asserts that he claims under a sheriff's deed upon a judgment of $1,188.25, rendered against W. E. Jones on the 6th day of June, 1866, and claims that no notice was
54 given, as required by law, when the land was sold; alleges the great inadequacy of price paid by Townsend; that the land was devisable, and, being of great value, should have been sold in lots instead of in bulk, as was done; that waste was being committed by said Townsend's tenants, and prays the court for an injunction, and that on final hearing Townsend's deed be declared void. This bill respondents answered on the next day after the bill was filed, to wit, the 17th day of Febr'y, 1869, and by way of cross-bill in said answer they set up for their client, Townsend, "That he is the owners of the tract of land in the bill mentioned, and is rightfully in possession of the same," and gave bond. And this cross-bill said
55 Annie L. Jones answered on the 11th day [of] Aug., 1869, by counsel, Wright, McKisick & Wright, in which answer they say that said David H. Townsend has no valid title to the tract of 646 acres of land or any part thereof, and that his claims thereto are unfounded and void. On 11 August, 1869, said Annie L. Jones filed an amended and supplemental bill, which respondents answered for Townsend on the 9th day of December, 1869. On the 14th of August, 1871, she filed an amended bill, which respondents answered on the 7th Sept., 1871. Without going further into the contents and merits of said case respondents refer to the record No. 3400, N. R. D., of this court for further information in this regard; so it was such proceedings had in that case that on the 18th July, 1871, a decree was entered by the chancery court of Shelby
56 county against said Townsend. In this decree it is adjudged that the court is of opinion that Townsend is not entitled to any relief on his cross-bill, and the same is dismissed. The litigation did not cease with this decree, but continued for some months, involving much further litigation, as will appear from said record which is referred to. From said decree respondents, for their client, appealed, and after some years the supreme court of the State re-

versed the decree of the chancellor and held that the bill should be dismissed, the court adjudging that the "complainants are not entitled to the relief prayed in their several bills—original, amended, & supplemental," and the said decree of the supreme court further adjudges: "It appearing that the
57 said Townsend is entitled to the relief prayed in his cross-bill to have his title declared and quieted, it is therefore adjudged that the said Townsend has a good title to the said tract of land and premises by virtue of his said purchase and sheriff's deed in fee-simple." It is further decreed that he recover costs; and, it being suggested to the court that the title of said Townsend has been assigned to Thos. P. Winchester, his assignee in bankruptcy, it is, with the consent of said Townsend, by his counsel, ordered that the said Winchester be made a party to this decree, and by consent this cause is remanded to the chancery court of Shelby county to take orders in relation to the fund (paid into court by compl'ts
58 in redemption from Townsend), "and to take an account and make a report of the reasonable counsel fees of the counsel, Heiskell, Scott & Heiskell, for which a lien is hereby declared on the premises in controversy, the said Winchester asking that said account be taken below." It should have been stated further that, pending the litigation, Townsend, upon advice of respondents, bought the dower interest of Mrs. Jones for $—, and so took possession of the whole tract and retained it until the end of the litigation. Upon the case being remanded a reference was ordered as to the fee of respondents. Compl'ts' counsel were fully informed of this, as respondents are advised and believe and so charge, and not only so — Geo. W. Winchester, the trustee in the deed of trust, was the father and law
59 partner of T. P. Winchester, and their firm were, as respondents believe and charge, the general counsel of said Townsend. They charge that said Geo. W. Winchester, the trustee, knew of the services of respondents, and so did T. P. Winchester and so did compl'ts, they having full knowledge and notice of the decree at the time it was rendered, or shortly thereafter, and before the end of the term of the supreme court at which the same was rendered compl'ts, The Hernando Ins. Co., and the receiver, McHenry, were fully advised of the account for respondents' fees. Respondents applied to the president of the Hernando Ins. Co. to see if it would do anything in the premises, and he referred resp'ts to compl'ts'
60 counsel in this cause as the then counsel of the Co., and compl'ts' counsel were applied to as such counsel by respondents, who informed the said counsel that they, resp'ts, had been referred to him by the said president of the Hernando Ins. Co. as its counsel to see if they would advise the payment of resp'ts' fee without a sale of the land. Respondents' best impression is that this took place after the fee was fixed by the clerk upon the reference, and before the confirmation of the report, and long before the sale of the land said counsel replied that they would look into the case, and did after some delay look into it thoroughly and knew all about it; knew, also, when the account was taken. Said counsel were notified to be present when witnesses were examined in

61 taking the account, but declined to do so, and when the account was taken said T. P. Winchester was present acting as counsel, and not only cross-examined respondents' witnesses but made a vigorous contest over the fee, and examined numerous witnesses, as did also resp'ts, as to the *the* value of the land and the amount of compensation due respondents, and when the account was closed the complainants' counsel were notified that respondents would move for the confirmation of the report of the clerk as to the fee, the amount of which is correctly stated in compl'ts' bill, and they declined to oppose the confirmation, saying "I will not resist it;" and respondents understood them to acquiesce in the justice and
62 reasonableness of the same, and the account itself was taken in the clerk's office, said receiver being a deputy clerk in the office and actually taking the account. The said report of the C. and M. was regularly confirmed and the sale of the land ordered to pay respondents' fee, and so respondents insist that, with full knowledge of the services being rendered by them on the part of compl'ts before and after the death of the trustee, Geo. Winchester, and also the bankruptcy of Townsend, there was no intimation from any quarter that respondents would have to look only to an insolvent client for compensation for years of professional labor, and with the knowledge of all the facts in connection with the taking of the account
63 of their fee under a decree of the Supreme Court declaring it a lien in that case and with a full knowledge of all the steps in the taking of the account of the report of the clerk and its confirmation by the court they never offer for their clients nor intimate to respondents that there is any objection to what is being done; not only so, but when the land was advertised for sale and the day of sale arrived compl'ts' counsel & the president of the Hernando Ins. Co. were present for the purpose, as respondents believe and charges, of purchasing the land and paying respondents' fee and getting the title to the property; but, learning that the order of sale did not cut off the right of redemption, they declined
64 to bid with the full determination to redeem after two years' delay to resp'ts, and the sale being postponed for a week, they were not present, though fully informed of the postponement and of the time when the sale was to come off. At the sale respondents had no other resource left them but to purchase the property, which they did for their fee, hoping the same would be paid them at an early date by compl'ts, or some of them.

Further when the time of redemption was nearly expired respondent, C. W. Heiskell, received letters both from S. H. Dunscomb, president, and F. M. Nelson, sec't'y, of the Hernando Ins. Co., all of said parties then being out of Memphis on account of the yellow fever, to this effect: "When is the time of redemption out on the
65 Townsend land? Where can we pay the redemption money and what will you take?" To which he replied: I do not know when the time of redemption is out (which he did not then know, nor does he now know, when it did expire), but if you will send me a check for our fee, $5,300, and interest up to date, here before the time does expire, it will be all right, but we will not receive

anything in redemption after the time is out. Respondents further state that compl't, the Hernando Ins. Co., as they are informed and believe and so charge, bought the right of redemption sold by T. P. Winchester, as assignee in bankruptcy of D. H. Townsend, at public auction, on the — day of ——, 18—, to be in a position
66 to redeem; and now, after all this, respondents are advised and so charge that compl'ts are estopped to deny the fact that they were represented in the proceeding that determined resp'ts' fee, or to deny that T. P. Winchester was authorized to act in the premises. They also insist that, with full knowledge of all the facts or with ample opportunity to know all the facts in relation thereto, both in the supreme and chancery court, and in full time to take all objections thereto, and after two years have barred their right of redemption, and with full knowledge or full means of knowledge that T. P. Winchester had been made a party to the decree as assignee in bankruptcy, and with full knowledge that he was conducting this litigation in connection with this fee, they allow him
67 to proceed without objecting to his so acting or asking to be made parties themselves. The said Geo. W. Winchester was fully informed of the fact that the decree was so rendered, and that his said son was so representing Townsend with regard to this fee, and now it comes too late for them to claim that they were no parties to any of the proceedings, especially as the deed of trust was executed years after respondents' rights accrued, and they in fact being purchasers *pendente lite* in which resp'ts' rights accrued, and have now and had at the filing of compl'ts' bill, as *as* they are advised, fully matured into a legal and indefeasible title to the land. Respondents further insist that the said T. P. Winchester having been a party to said proceeding is barred and precluded from
68 instituting any proceeding to set the same aside, and that the proceedings in the case are conclusive against him and forever estop him, and so as to that part of the bill which charges that thus ended this litigation, and counsel for their fees took the whole recovery. Respondents say that this is true, and, as they understand it, this occurs always when the lien of counsel is enforced by proper proceedings in court and where at the sale ordered no one will pay the fee and take the property; indeed, if respondents are not misinformed, it is a rule at all public sales of property that the highest and best bidder gets the property, especially if all parties who are interested except one declines to bid at all, nor do respondents well
69 see how they could make themselves exceptions to this rule under the circumstances above set forth, especially as to parties to whom they are under no obligation and occupy no relation of counsel or trust. Notwithstanding all this, before the filing of compl'ts' bill and after the time of redemption had expired, the compl't, The Hernando Ins. Co., sought respondents through its president and wished to know what resp't would take in redemption of the land. Resp'ts replied that they would take their fee with interest, although they then said and now reiterate they have a perfect right to the property, which is valuable. As to that part of the bill which
70 arraigns the witnesses who testified on the reference to deter-

mine resp'ts' fee they deem it unimportant to answer further than to say that they were men, to say the least, of common sense and judgment, being lawyers of high standing at the bar, and if compl'ts had aught to say in the premises they ought to have said it at the proper time, as they had full notice and ample opportunity to do so, and, as resp'ts are advised, it is now too late to complain of or question this matter. Further answering, they say that upon the facts as set out in the answer they are advised they had a lien on the land recovered, as they did recover the property in litigation both by their advice in the first instance and by their services in the case thereafter; and they are advised that the fact that they asked
71 and obtained full relief on their cross-bill entitled them to have the lien declared, and the supreme court of the State, it would seem, thought so too, as they decreed it to resp'ts, and so the matter is settled and passed into judgment by the highest tribunal in the State; nor do they understand that in such cases it is necessary to notify their client that they are going to have a lien declared; nor do they understand that either he or any of compl'ts were entitled to such notice, but they believe, and so charge, that there was such notice in the case if it were required as would bind both Townsend and compl'ts, and they charge that said
72 Townsend did know all about the fixing of resp'ts' lien, and, as they believe and charge, before the end of the term of the supreme court at which the decree was rendered, and he had full knowledge of all of the steps taken in fixing the fee, and declared he would resist the fee upon the ground that resp't Scott had agreed to a fee of $1,000.00; but his counsel, T. P. Winchester, after enquiring into all the facts on this point, failed to make the question at all, and during all this time and anterior to the decree of the supreme court the said T. P. and G. W. Winchester were the solicitors and advisors and general counsel of the said Townsend, and the said T. P. Winchester was also his assignee in bankruptcy. But however this may be, after all that has been above
73 detailed that took place then and afterwards up to the filing of compl'ts' bill, they are advised that it does not lie in the mouths of any of compl'ts to complain or ask relief in the premises; and however it may be, as stated in the bill, that after Townsend's bankruptcy he and his assignee had only an equity in said land, certain it is that when respondents' lien accrued, which was long anterior to the accrual of the rights of compl'ts under the deed of trust, the said Townsend did have the legal title to the property, and the property being gained by the labor of respondents, they are advised that it was not necessary, in order to have their lien
74 declared and fixed, to do more than the court in that cause to declare and fix it; and if the court so orders, as it did in this case, that is an end of the question; and, further, that the decree declaring this lien and fixing it on the land in controversy changes that which was before a mere right or equity to a judgment on the *rem* valid against all the world, and so they are advised and insist the judgment of the supreme court was valid and binding upon everybody, and is an estoppel of record and adjudication against

compl'ts and all the world; and so it was not necessary, as the bill insists, that they should have any representative other than was before the court when said decree was rendered,
75 and resp'ts insist that said compl'ts, becoming interested in the property pending the litigation—if, indeed, they have any interest whatever—had their election to have the proceeding continued in the name of Townsend or to themselves come in and conduct the same for themselves. If they, having elected to allow said proceeding to be conducted in the name of said Townsend, and having further permitted the said assignee in bankruptcy to assume and take the control of record of the same, and having never in any manner dissented while the proceedings were *in fieri*, they are not at liberty now to deny that orders taken against the said Townsend or against the said Winchester are binding upon them. Re-
76 spondents insist that the said complainants are estopped to set up this claim against them, because when the said resp'ts first took a decree for said lien, and while they were proceeding to obtain judgment for the same and to sell the lands aforesaid, they (*i. e.*, complt's) had the right of election to prove their claims in bankruptcy and to obtain a share in the distribution of the estate of the said Townsend, but that afterwards and before [the] filing of the bill the said proceedings have so progressed that their remedy in regard thereto has been barred and lost. Compl'ts being cognizant of the steps in progress to charge the lands they now claim were bound either to come in and make themselves parties or protect their interests by proceedings in the name of those who
77 were before the court, or they were bound to come forward promptly and institute their proceedings promptly to vacate the same, and they insist that the said parties have not proceeded in proper time or with due diligence in the prosecution of their said remedies as to the prayer of the bill for the appointment, because respondents are in possession and are not paying the taxes. Respt's deny the right to a receiver under the facts as alleged in this case, and they are advised that courts never appoint a receiver in ejectment nor where relief is sought against one in possession of real property claiming in fee—at all events not unless there is insolvency charged and prayed against the possessors, which is not pre-
78 tended in this case. Respondent W. L. Scott states that he has no personal knowledge of any facts stated in the foregoing answer or in complainants' bill as having occurred or which did occur subsequent to July, 1875, this resp't having removed from the State during that month and never having returned. With this qualification he adopts the entire answer, and as to the matters subsequent to July, 1875, upon information derived from his co-respondents, which he believes to be in all respects correct and true; and now, having fully answered, respondents ask to be hence dismissed, &c.

W. L. SCOTT.

STATE OF MISSOURI, *City of St. Louis:*

Personally appeared before me W. L. Scott, one of the re-
79 spondents in the foregoing answer, and, being first duly

sworn, says that the facts therein stated are true to the best of his knowledge, information, and belief.

W. L. SCOTT.

Subscribed and sworn to before me the 22d of May, 1880. My commission expires Sept. 8, '81.

[SEAL.] D. W. WEAR,
Notary Public.

STATE OF TENNESSEE, *County of Shelby:*

Personally appeared before Robert J. Black, clerk and master of the chancery court of Shelby county, J. B. Heiskell and C. W. Heiskell, who made oath in due form of law that the statements made in the foregoing answer as of their own knowledge are true, and those made upon information they believe to be true.

J. B. HEISKELL.
C. W. HEISKELL.

Sworn to & subscribed before me this 8 day June, 1880.

R. J. BLACK, *C. & M.*

80 *Depositions of D. H. Townsend and Jno. E. Spicer. Filed Aug. 9, 1880.*

D. H. TOWNSEND, by compl'ts' counsel:

1st. Where do you reside and what is your occupation?

Ans. I reside in Shelby county; am a farmer.

2nd. State whether or not you are the D. H. Townsend who was a party defendant to a suit recently pending in the chancery court at Memphis and in the supreme court of Tennessee at Jackson, in which Annie L. Jones and others were complainants and D. H. Townsend was defendant, involving a contest about the title to a tract of about 640 acres of land in Shelby county, below Memphis, and being the same land involved in this suit.

Ans. I am.

81 3rd. Who were your attorneys or solicitors in the defence of that suit? And state, if you please, the circumstances connected with your employment of them to defend the suit; state fully.

Ans. Heiskell, Scott & Heiskell were my attorneys in that suit. The way I came to employ them was, when I returned from the South in 1865, I found in possession of Poston, Humes & Scott certain claims against me for collection; I asked them not to bring suit on the claims and I would place double the claims in their hands to bring suit, and if they failed, on taking judgment to collect the claims, I would pay them the cash for whatever they had against me. They agreed to this and collected sufficient to pay all

82 claims in their hands. Among the claims I placed in their hands was one against W. E. Jones, on which they took judgment, and sold the land in controversy (647 acres, I believe, lying on Nonconnah) under execution and bought it in my name, but failing to take deed for the same. After the death of W. E. Jones,

his widow had dower laid off out of the tract, for which, under the advice of Heiskell, Scott & Heiskell I paid her $2,500 in order to get possession of the tract. I took possession and shortly afterwards Annie L. Jones and Jones' heirs filed a bill in chancery in Memphis to dispossess me. W. L. Scott came to see me on that account, and I said to him that if he would defend the suit and perfect the title to the land I would give him one thousand
83 dollars. This was all that occurred between us in regard to the defense of the suit until two or three years afterwards, when they send a bill in against me for $4,000, which I refused to recognize. It must have been in 1872 or 1873 that they sent in their bill. In the meantime I had paid Mr. Scott in wood and cash about $590. This was paid in wood from the place and cash from the office. They also applied to me to give them a mortgage on the place to cover their fee previous to sending in their bill, which I refused to do.

4. Where did the conversation with Judge Scott occur, in which you said you would give him $1,000 to defend the suit, &c.,
84 & who else was present, if any one?

Ans. It occurred in my office in Memphis in the presence of Jno. E. Spicer and Walter Staley.

5. Did Judge Scott hear what you said about giving him one thousand dollars to defend the suit?

Ans. Yes; he heard it.

6. What reply did he make, if any?

Ans. He made none at all, but went on to defend the suit.

7. Was this before any steps were taken by him in the defence of the suit by preparing answer, or otherwise?

Ans. Yes, sir.

85 8. State whether there was any other contract or conversation between you and Judge Scott, or either of the Messrs. Heiskell about their employment to defend the suit.

Ans. None other.

9. State whether or not you are positive about you having paid these gentlemen as much as $590 on this fee, as stated in a former answer.

Ans. I am positive about that.

10. Please state whether or not you paid Poston, Humes & Scott their fee or commissions for taking the judgment on the claim against W. E. Jones and subjecting this tract of land to the execution.

Ans. I did.

86 Defendants Heiskell, Scott & Heiskell except to the foregoing deposition for incompetency and irrelevancy in this cause and cross-examine as follows, reserving the right to cross-examine further hereafter:

X 1. How do you arrive at the amount you claim to have paid Judge Scott on fee in this cause?

Ans. I take it from amounts paid Kelly Manage on this place for wood delivered to Judge Scott, and from Judge Scott's receipts for

amounts paid him in cash, all which Judge Scott admitted to be correct.

X 2. Did you ever present an itemized bill to Judge Scott containing all these payments and amounting to $590.00?

Ans. I rendered him an itemized bill and he acknowledged it correct.

87 X 3. Can you make a duplicate of this itemized bill and attach it to this deposition?

Ans. I could if I could get the books of D. H. Townsend, but they were placed in the hands of T. P. Winchester, my assignee in bankruptcy, and I cannot find them.

X 4. Cannot you make exhibits of the receipts of Judge Scott; and cannot you find out the whereabouts of the books?

Ans. My receipts were filed in receipt book and were turned over to said Winchester with my other books. Mr. Winchester has gone to Fort Smith and I cannot find out where the books are. I have one receipt, which I will produce. These books would show

88 the exact amount received by Judge Scott, and how much in wood, how much in cash. I took no receipt for the wood—only for the cash.

And further deponent saith not.

D. H. TOWNSEND.

Sworn to & sub- * * * before me July 24, '80.

R. J. BLACK, *C. & M.*

Ex. "A" to D. H. Townsend's Deposition. Endorsed "D. H. Townsend."

$50. MEMPHIS, TENN., *May* 8, 1869.

Received of D. H. Townsend fifty dollars, amount paid Heiskell, Scott & Heiskell for services on ac. of Jones' case.

[2c. rev. stamp, can.]

HEISKELL, SCOTT & HEISKELL,
Per JAMES BRIZZOLARI.

JOHN E. SPICER, by compl'ts' counsel:

89 1. Where do you reside, and what is your occupation?

Ans. I reside in Memphis and am a cotton-shipper.

2. Prior to the bankruptcy of D. H. Townsend what was your employment, and for how long a time did that employment continue?

Ans. I was cotton salesman for D. H. Townsend and in his absence had general charge of his business. I had been thus engaged since June, 1865, until about a year before his bankruptcy.

3. Do you know the deft's to this suit; if so, how long have you known them?

Ans. I know them all and have known them since they have been in Memphis.

90 4. Please state whether or not you ever heard a contract or conversation between D. H. Townsend and W. L. Scott in reference to the employment of the latter by the former to defend a

suit of the heirs of W. E. Jones against Townsend for the recovery of a tract of about 640 acres of land in Shelby Co., below Memphis; if so, state as near as you can about when and where the conversation occurred, who were present, and report the conversation, *on* the substance of it?

Ans. I did hear a conversation or contract between the parties on the subject embraced in the question. I think it was some time in the year 1869, to the best of my recollection. The conversation occurred in the office of D. H. Townsend. My recollection is
91 that no one was present except myself and W. L. Staley, besides Scott & Townsend. I think Mr. Scott had come to the office by appointment with Mr. Townsend to talk the matter over in regard to the suit the heirs of Jones had brought against Mr. Townsend to recover this place. I can't recollect all that was said during the conversation. Mr. Townsend was anxious for Heiskell, Scott & Heiskell to undertake the case, and my recollection is that Townsend made Scott a proposition to give him one thousand dollars to protect the title to the property. In other words he was to give him $500 anyway, and $1,000 if he protected the property. I felt a good deal of interest about the matter, for Mr. Townsend had had a good deal of trouble about the property, and according to
92 my best recollection this was the understanding between the parties.

Defendants, Heiskell, Scott and Heiskell, reserving exceptions to the foregoing testimony for incompetency in this cause, proceed to cross-examine, reserving also the right to further cross-examine hereafter.

X. 1. Can you state positively that Judge Scott came to the office of Mr. Townsend by appointment in regard to the Annie L. Jones case?

Ans. I cannot state positively, but I have such an impression.

X. 2. Did you understand the proposition above refered to as made by Mr. Townsend to mean $500.00 cash at the beginning of the litigation, and did you then understand it to mean $500.00 or $1,000.00
93 more at the conclusion of the suit in the event of success?

Ans. I understood the proposition to be that Mr. Townsend would give Heiskell, Scott & Heiskell $500.00 to undertake the suit and $500.00 more in the event of success.

X 3. What did Judge — say to this?

Ans. My recollection is that he accepted the proposition. I cannot remember what he said.

X 4. Are you sure that Judge Scott made any reply to Mr. Townsend's proposition?

Ans. To the best of my recollection he did reply and accept the proposition.

And further deponent saith not.

JNO. E. SPICER.

Sworn to and subscribed before me July 24, '80.

R. J. BLACK, *C. & M.*

94 *Deposition of W. S. Staley.*

Taken upon interrogatories, Aug. 31, 1880, before A. G. Pendleton, notary public, in presence of F. H. Heiskell, att'y for def'ts. Caption & certificate in proper form. Witness, aged 44, duly sworn. Filed Sept. 2, '80.

By compl't:

1. Where do you reside? What is your age and occupation?

Ans. I reside in Marion, Virginia; I am 44 years old, & my occupation is milling.

2. Did you ever reside in Memphis, Tenn.; if so, during what period of time? State as accurately as possible.

Ans. I did reside in Memphis, Tennessee, from 1859 to 1879, being absent four years during the war.

95 3. Do you know the parties defendant to this suit, viz., J. B. Heiskell, W. L. Scott, & C. W. Heiskell, or either of them? If so, state how long you have known them.

Ans. I know C. W. Heiskell and C. W. Scott very well. I know J. B. Heiskell when I see him in the street. I have known them for 8 or 10 years.

4. If you say that you once resided in Memphis, state whether or not you knew D. H. Townsend, and whether you were associated with him in business in any way; if so, how long and during what period of time?

Ans. I knew D. H. Townsend—I was his book-keeper. I was associated with him from 1859 to 1875, except the time above mentioned. I was his shipping clerk from 1859 to 1861; from fall of 1865 to 1875 I was his book-keeper.

96 5. State whether or not you ever heard any conversation between D. H. Townsend & W. L. Scott (or either of the other defendants) in reference to the employment of Messrs. Heiskell, Scott, & Heiskell as the attorneys or solicitors of said Townsend in a litigation between him and Annie E. Jones and the heirs of W. E. Jones about a tract of about 646 acres of land in Shelby county, below Memphis, being the land in controversy in this suit. If you — please state that conversation fully and in detail.

Ans. The conversation I heard was between D. H. Townsend and W. L. Scott, which was as follows: Judge Scott said he knew the title to the tract of land in controversy was good and that he would attend to the suit and secure him the title to the land for a

97 fee of $1,000.00. Mr. Townsend told Mr. Scott the case. Townsend had advanced Jones money and for taxes on the land, and Townsend brought suit against the widow and heirs of W. E. Jones upon his statement of the case. Judge W. L. Scott agreed as above stated to — the suit & secure the title to the land for a fee of $1,000.00.

6th. State about where and when this conversation occurred and who were present at the time.

Ans. It was in the office of D. H. Townsend, in Memphis, but I don't remember the time. Mr. Townsend, John E. Spicer, Judge

Scott, and myself were present; there may have been others present, but I don't remember.

7th. If you have not already done so, please state whether
98 said parties agreed upon the fee to be charged said Townsend by Messrs. Heiskell, Scott & Heiskell for their professional services in said litigation and what the amount of the fee was.

Ans. I have already stated the fee. Judge Scott was of the firm of Heiskell, Scott & Heiskell.

8. If you ever heard any other conversation between said Townsend and either of the def'ts please detail it fully and circumstantially.

Ans. I have no doubt there were other conversations between them; Judge Scott was there often, but I don't remember any other conversation.

9. If in answer to either of these questions you say you heard Mr. Townsend tell Judge Scott that he would give him a certain amount as a fee in the Jones litigation, please state whether
99 Judge Scott heard Mr. Townsend's proposition and what answer he made or what he did; state fully.

Ans. Judge Scott heard the proposition, as I have already stated; he said, as I remember, he could secure the title, and that he would attend to it for the fee of $1,000.00; he said he would undertake it or attend to it for $1,000.00.

10. State anything else you may know that will benefit either party to this suit.

Ans. There were other conversations about the matter, but I don't remember anything particularly of them. Mr. Scott used to come around often to see Mr. Townsend, and Mr. Townsend went often to see Judge Scott, but I don't remember particularly any other conversation.

100 Reserving exceptions to all of foregoing deposition as to relevancy and competency, def'ts, by att'ys, proceed to cross-examine:

X Q. Do you remember the exact date of the conversation you refer to as having occurred between W. L. Scott & D. H. Townsend. Do you remember what time of year it was?

Ans. I don't remember the exact date, but it was after the war; I think in 1866 or 1867. I can't remember the time of the year.

X Q. Can you recall whether it was cold or warm weather at the time?

Ans. I cannot now recollect.

X Q. Were you and Mr. Spicer engaged in the conversation in question—did you take part in it?

101 Ans. I don't think we engaged in the conversation, but we were there and heard the conversation.

X Q. How were you and Mrs. Spicer situated in the office, and where were Mr. Townsend & Judge Scott standing; how far were you and Mr. Spicer from Mr. T. and Judge Scott?

Ans. Mr. Spicer and myself were at our desks, and Mr. Townsend and Judge Scott were sitting near the desk, about the center of

the room, not over ten feet from us; I don't think it could have been that far.

X Q. Please state exactly what Mr. Townsend said to Judge Scott and what Judge Scott replied; if you cannot give the exact conversation please so state.

Ans. The answer to the 5th interrogatory gives my recol-
102 lection of the conversation; I don't know that the statement contains the exact language of the parties.

X Q. Was anything said about this $1,000 — was to be paid?

Ans. I don't remember how it was to be paid, at what time, or in what way; whether in money or not.

X Q. Do you know whether this conversation you refer to took place before or after the bill filed by Annie E. Jones and others in 1869 to dispossess D. H. Townsend after he had got possession of this land?

Ans. It must have been before the bill was filed by Mr. Jones.

X Q. Are you certain that at the time of the conversation
103 you speak of Judge Scott was a member of the firm of Heiskell, Scott & Heiskell; are you certain he was not a member at that time of the firm of Poston, Humes & Scott?

Ans. I am not positive, but I think he must have been of the firm of Heiskell, Scott & Heiskell at that time.

X Q. You say Mr. Townsend proposed to give Judge Scott $1,000.00 to perfect the title to the land. Did you hear Judge — reply to this proposition before he left the office?

Ans. I remember that he replied to the proposition; I heard him. The reason why I remember the thousand-dollar fee was that Mr. Townsend, Mr. Spicer, and myself have talked the thing over
104 frequently in the office.

And further this deponent saith not.

W. S. STALEY.

Given under the hand and seal of—

A. G. PENDLETON,
Notary Public.

Aug. 31, '80.

Deposition of W. L. Scott. Filed Nov. 17, 1880.

Taken upon interrogatories by def'ts before Jas. P. Maginn, notary public, Oct. 23, '80, at St. Louis, Mo.

Int. 1. Where do you reside; how long have you resided there; where did you move from? Also state your name, age, and ocupation.

Ans. I reside in the city of St. Louis, Missouri, and have resided in this city since the middle of July, 1875; I moved to this place from Memphis, Tennessee; my name is William L. Scott; my
105 age is between forty-six and forty-seven years, and I am a lawyer by profession and am engaged in the practice of my profession.

2. Are you the W. L. Scott who is one of the def'ts in this cause? And, if so, state when, how, and by whom said firm of Heiskell,

Scott and Heiskell were employed; state fully all that you may know on the subject of the employment of said firm by D. H. Townsend; what said firm was first employed for, and how that employment was afterwards, — if it was so.

Ans. I am the W. L. Scott who is one of the defendants in this case; I was a member of the firm of Heiskell, Scott & Heiskell, who represented D. H. Townsend in the case of Annie L.
106 Jones & *al vs.* D. H. Townsend in the chancery court at Memphis and in the supreme court of Tennessee. To answer properly the questions as to the employment of this firm by Mr. Townsend and as to their first employment by him it is necessary to give a history of my connection with the matters out of which the litigation of Annie L. Jones *vs.* D. H. Townsend arose. In 1865 and up to June, 1866, I was a member of the law firm of Poston, Humes & Scott in Memphis, and while such D. H. Townsend employed the firm to collect a note which he held upon one Wm. E. Jones. I attended to the collection, brought suit upon it, reduced it to judgment, had an execution issued upon the judgment, which was levied upon the same tract of land which was the subject-matter of the
107 above-mentioned suit of Jones *et al. v.* Townsend. At the sale the land was struck off to said Townsend as the highest and best bidder. This concluded the service of Poston, Humes & Scott as to the collection, and I think—indeed I have no doubt—that Mr. Townsend paid for this service; but I advised Mr. Townsend at the time, and in a very short time after the land was struck off to him, not to take a deed from the sheriff, but to wait until the two years had expired, and if Jones did not redeem the land that the deed would then be made; and my recollection is that Mr. Townsend told me that he would expect me to attend to the matter of having the deed made by the sheriff if the land was not redeemed.
108 I kept it in mind because I regarded it as a magnificent prize for Townsend if it were not redeemed. At the expiration of the two years, I prepared the deed with great care, had it executed, and superintended its acknowledgment and registration. My best recollection is that I informed Mr. Townsend that the two years had expired and that the deed should now be made and recorded, and congratulated him upon the result. It is possible I am mistaken in saying that I first informed him, but I think not. If he mentioned it to me I already knew it, for I had, as I have said, kept it in mind all the while. Mr. Townsend, in accordance with the previous understanding, employed *are* to attend to drawing the deed and
109 seeing to its registration; he also desired me to attend to his interests, whatever they might be, connected with the land. At this time I was a member of the firm of Heiskell, Scott & Heiskell, which Mr. Townsend well knew. I discovered that there would be some embarrassment in respect to Mr. Townsend's possession of the land when he told me the facts, and many interviews and consultations resulted—most of them at the office of Heiskell, Scott & Heiskell, at most of which Mr. Townsend was present. I remember that there were embarrassing questions as to perfecting his possession, upon which the firm consulted, and in respect to which I

looked into the books. We advised Mr. Townsend in respect to all matters connected with his possession; and as to perfecting
110 his possession to the land, amongst other things done, I remember a written agreement drawn up by us between him and a Mr. Etter, and I think there was one between him and a person on the land. I think the agreement with Mr. Etter was in relation to his occupancy of the land as the agent or tenant of Mr. Townsend. I had made investigations of his title also, and had taken measures to get rid of all tax claims, and my recollection is that I succeeded in freeing the land from certain tax titles which rested upon it, and got the necessary certificates of redemption. There was also some services rendered in the preparation of an injunction bill, which, however, was never filed. I do not distinctly remember what the injunction process was
111 to restrain, but I have an impression it was to restrain waste in the matter of destruction of timber on the land. In all these matters they were frequent consultations by the firm and advice given to Townsend. I think he was advised at this time in reference to getting the dower interest of the widow, but I do not remember whether or not Mr. Townsend entered upon negotiations with the widow for its purchase previous to the filing of the Jones bill. All the advice and services above referred to was given and rendered before the Jones bill was filed; whether or not I have stated it all I cannot say. I have mentioned all I recall. I have said I was a member of [the] firm of Poston, Humes &
112 Scott until June, 1876, but, while the firm was dissolved at that date, it was not settled up then, and I continued to represent the cases that I had in charge previous to the dissolution. At the time the two years' redemption expired I was a member of Heiskell, Scott & Heiskell. The Jones bill was filed about the middle of February, 1869, I think, and we continued to represent Mr. Townsend in that case. Our firm understood that we were his lawyers in all matters appertaining to the land.

3. State fully and particularly what conversation passed between you and Townsend, when you were employed, and, if you know, state who was present at this conversation or conversations.

113 Ans. I do not remember what particular conversations passed between Mr. Townsend and myself at the time I was employed. As I have already said, I think I called his attention to the fact that the two years had expired, or, if he mentioned it to me, I already knew it, and I proceeded at once to prepare and have executed the sheriff's deed, which was in accordance with our understanding at the time of the sheriff's sale or shortly thereafter. I have no recollection as to who was present or whether any one was present at that time, and I continued to represent him as a member of the firm of Heiskell, Scott & Heiskell, as already stated.

114 4. Did you ever agree to take one thousand dollars in full of all compensation in the defence of the case of Jones *v.* Townsend and the prosecution of the cross-bill of Townsend *vs.* Jones? State fully all that passed on this subject between you and Townsend.

Ans. I can answer this question with entire confidence that I never did. I never did assent to any such proposition consciously; if I ever appeared to do so then I did not apprehend its purport. I have not the slightest recollection of any such proposition ever having been the topic of conversation between us. I do remember to have gone several times to Mr. Townsend's office to see about having wood hauled to my house from this land, as Mr. Townsend had agreed to furnish me wood
115 to go as a credit on fees, and I had acquainted my partners with this arrangement, and it was satisfactory to them, but I am unable to recall any conversation at his office when the subject of fees was spoken of. I think, as I have spoken thus confidently as never having agreed to take $1,000, or that my firm would take this amount as compensation in the Jones *v.* Townsend case, and, as I also state that I have not the slightest recollection of any such proposition ever having been made or spoken of between us, that I should state the facts and circumstances within my recollection that cause me to make a statement of so positive a character. It was a rule of the firm of Heiskell, Scott & Heiskell to fix fees with
116 clients only after consultation as to what the fees should be. I have no recollection of any departure from this rule at any time during the existence of the firm, even in respect to small fees, and to the best of my recollection, where fees had been agreed upon, entries were made on the books of the firm showing what the fees were. When our partnership was formed the Messrs. Heiskell, as well as myself, brought certain old cases into the firm, and we stated what fees had been agreed upon in all cases when they had been fixed. When I speak of a rule as to fixing fees I do — mean any formal regulation, but that it was our custom. I never at any time stated to the Messrs. Heiskell, or either of them, that I had fixed the fees with Mr. Townsend for
117 any amount, or in any way, nor did I ever make any entry of a $1,000 fee on the firm books, or know of any such entry having been made. There were many interviews between Judge Carrick, Heiskell, and myself during the pendency of the Jones *vs.* Townsend suit in respect to the fee we would get, and we both expected a magnificent fee if we gained it, and believed we would have earned it. We spoke of this as a magnificent recovery for Mr. Townsend if he was successful, as the land was very valuable, and, after deducting the whole cost to him, including liberal fees to us, he would have a han-some estate in the ownership of the land. We both felt a strong interest in our fees, and frequently counted over all the "big fees" we expected or hoped to realize out of our
118 cases. In case of Jones *vs.* Townsend the bill, as I remembered it, stated the value of the land at from $50,000 to $60,000, and the whole cost to Mr. Townsend, including a liberal fee to us, would leave him a magnificent tract of land, which would be just so much clear gain. The case on behalf of complainants was most ably, industriously, and zealously conducted by Judge Wright, and required the best skill and ability and the most laborious and thorough service in conducting the case for Mr. Townsend

that I was capable of. (I had charge of case.) We, for the foregoing reasons, expected a very liberal fee. We never fixed upon the fee we would charge in any of our interviews, unless it may
119 have been understood at one time, when I presented a mortgage deed to Townsend for his signature, that $4,000 would be a fair fee, but whether for services up to that time I do not remember. I have no distinct recollection that the amount was $4,000, but understood Mr. Townsend so testifies, and I suppose he states it correctly. To the very best of my recollection I never knew or heard that Townsend claimed that I had agreed to a fee of $1,000 until some time after I moved to St. Louis, and I then heard it with astonishment. I had a conversation with Mr. Townsend in the office of Heiskell, Scott & Heiskell on the subject of the fee we would charge him in this Jones *vs.* Townsend cases one day; the precise date I do not remember, but I do remember that it
120 was after he purchased the widow's dower; it was a considerable time after the Jones bill was filed. In this conversation the fee was spoken of as not having been agreed upon. My best recollection is that Townsend introduced the subject of fees in that case and expressed the view that it ought to be fixed, and stated some amount as being, in his opinion, a proper charge. I cannot recall the amount he stated, but I do remember I regarded it as ridiculously small. I do distinctly remember of saying to Townsend that he estimated the fee altogether too low, and I then pointed out to him what his actual expenditures had been. I enumerated all the items, amount he had bid the land off at, and the other expenditures he had been at, the amount he paid for widow's dower, and showed him what the sum
121 total was. My best recollection is that, exclusive of amount paid for dower, his expenditures were less than $2,000. It may have been a little more, but it was in that neighborhood. It was probably between $1,700 and $2,000. I then pointed out to him the value of the land and referred to the value stated in the Jones bill. Mr. Townsend said it was not worth near so much, but I think we both spoke of it as being worth at least $30,000, or in that neighborhood, and I then pointed out to him what a valuable tract he would get after estimating all expenditures and paying our fees liberally, and that the land would be a clear gain to him of a large property after deducting every expenditure. I stated to him that
122 I though a fair way of arriving at a proper fee to us would be to fix it at a per cent. on the value of the land after deducting what it had cost him, the $2,000, or about, and amount paid for dower, which I had already counted up. I did not propose, then, to fix the fee, but made this suggestion as a good mode of fixing it. I would not have proposed to fix it, as both my partners were absent from the office on that occasion. Mr. Townsend did not agree that the fee might be fixed in that way, and he left the office with no agreement or understanding either as to what the fee should be or as to the basis upon which it might be estimated and he
123 left with a wide difference existing in our respective estimates of what a reasonable fee would be. We both understood the

fee to be a matter unfixed, and the whole conversation between us was on that assumption. I remember where I sat and where Mr. Townsend sat during the conversation. I sat at my desk and Mr. Townsend sat facing the fireplace. I think there was some one on the other side of the fireplace at another desk, most probably one of the young men who staid in the office, but neither Col. or Judge Heiskell were there in the office. It is my recollection of the foregoing facts that causes me to say confidently that I never understood any proposition of $1,000 or of any other amount (unless the amount
124 stated in my office by Mr. Townsend on the occasion above referred to could be considered a proposition) as having been made to me and assented to by me as the compensation for the defence of Jones *v.* Townsend.

5. Did you ever make application to Townsend to give our firm (Heiskell, Scott & Heiskell) a mortgage on the land in controversy for our fees? And, if so, state fully all that passed between you on this subject.

Ans. I have seen a copy of what purports to be a copy of Mr. Townsend's deposition in this case, and read what he says about the $4,000 mortgage. I have some recollections of requesting him to sign a mortgage on this land to secure some amount of fee, but do
125 not recall the amount. I remember he declined to do so, and I think he refused on the ground that the fee was altogether too large. I cannot answer the question more fully than this.

6. State fully as to the payment of the $590 or $593.

Ans. The books of Heiskell, Scott & Heiskell will show all the credits Mr. Townsend is entitled to. I think they amounted to $593.50. The most of it was for wood furnished me off of the land.

7. State fully anything else you may know which may be of advantage to def'ts in the defense of this cause.

Ans. I have already answered to the best of my recollection in respect to the matters in controversy.

126 Cross-interrogatories:

X 1. May you not be mistaken in reference to some of the points testified to by you in your direct examination?

Ans. Where my memory does not serve me I have stated it in my answers to questions in my direct examination. I do not think I can possibly be mistaken in the matters in which I state I have a positive recollection, or when I profess to state facts without qualifying my statement. When I think I may possibly be mistaken I have made the statement upon my best recollection.

X 2. These things occurred a number of years back and you were not expecting to be called on to repeat them as a witness.
127 How can you be positive under such circumstances that your recollection of them is strictly accurate in all respects?

Ans. These things did occur a number of years back and I was not expecting to be called upon to repeat them as a witness. I cannot be positive that my recollection of them is strictly accurate in all respects, but I can only repeat my answer to the preceeding cross-

interrogatory. I will say further that these matters have been the subject of most anxious thought to me, in respect to which I have earnestly striven to remember every fact and circumstance bearing upon them ever since I was informed that Mr. Townsend and
128 Staley and Spicer would testify as to an agreement between Mr. Townsend and myself as the charge to be made in the case of Jones *v.* Townsend.

X 3. If two or three witnesses swear positively that a certain conversation occurred between you & Mr. Townsend in reference to your employment in this Jones case, would you not be disposed to doubt the accuracy of your memory when it is in conflict with their testimony?

Ans. As I have already said, there is an entire absence of recollection on my part of any interviews in which the subject of fees was spoken of in Mr. Townsend's office, but, as I do positively recollect facts and circumstances (those which I have detailed in my examination-in-chief) which are irreconcilable with the
129 existence of any such understanding or agreement, I must state that I am not disposed to doubt the accuracy of my memory, except as heretofore stated in answer to cross-inter. 1; as an abstract proposition, however, I would have to answer the question in the affirmative. In the particular case I am compelled to believe that these gentlemen are mistaken, and that they did not comprehend the purport of the conversation, and I am positive that I did not correctly apprehend the proposition if any such was ever intended to be made.

X 4. When you were employed to attend to the Jones suit, the cross-bill that was afterwards filed was not in the contemplation of
130 the parties, was it, and *and* therefore that was not in express terms embraced in your contract with Mr. Townsend; is this not so?

Ans. I do not remember that the cross-bill was filed after the answer; so far as my recollection serves me it was filed at the same time and as a part of the answer. The record will show how this is, and I will not pretend to make a positive statement about it. There was no express contract with Mr. Townsend as to the fee in Jones *v.* Townsend. I have already testified as fully as I can as to the employment in that case.

And further deponent saith not.

W. L. SCOTT.

STATE OF MISSOURI, *County of St. Louis:*

This 23 day of Oct., A. D. 1880, W. L. Scott appeared
131 before me and subscribed the foregoing depositions in my presence, &, being first duly sworn by me, stated that the answers to the interrogatories and cross-interrogatories therein contained are true & correct. My term of office expires April 28, '82.

[NOTARIAL SEAL.] JAS. P. MAGINN,
Notary Public.

Deposition of T. P. Winchester.

Taken before Jos. S. Miller, J. P., Dec'r 1, 1880, in county [of] Sebastian, State of Ark., by consent. Exceptions reserved for competency and relevancy, &c. Filed Dec. 4, '80.

By def'ts:

1. Please state whether you at any time had a conference with any member of the firm of Heiskell, Scott & Heiskell after you were appointed assignee in bankruptcy of D. H. Townsend
132 as to the further prosecution of the suit of Jones *v.* Townsend; and, if so, what did you propose as to the suit; did you offer to pay for the services to be performed out of the bankrupt estate, or did you say that after advising with your father you declined to do so and suggest that the firm should go on with the suit and look to the recovery for their fees; or, if not, what did you propose, if anything, in relation to the suit? State, also, what was said, if anything in reply to your proposition.

Ans. I had a conversation with Gen'l J. B. Heiskell, a member of the firm of Heiskell, Scott & Heiskell, just before the case of Jones *vs.* Townsend was tried in the supreme court—I mean before
133 the term of court commenced. I told him I had no money to pay out of the estate for further services, but that I was sure that I ought to be represented; that if they were willing to look to the recovery for a fee they might go ahead. I did not say that after advising with my father I declined to pay anything out of the bankrupt estate as fees in this cause.

2. Had you in fact, before your interview with said member of the firm of H., S. & H. (if you are sure you had such), held a consultation with your father as to whether you would be justified in paying anything out of the estate to secure the further prosecution of said suit, and upon what ground did your father base the conclusion that it would not be advisable to furnish funds to
134 pay for the further prosecution of the suit?

Ans. I had, before this interview with Gen'l H., talked the matter over with my father, the object being to know whether, as assignee, I had a right to expend the bankrupt estate in doubtful litigation, the fact of taxes and other incumbrances then upon the property being considered. We decided that it was discretionary with the assignee, and I, as assignee, determined not to take the risk, because even [if] I gained the land the encumbrances would swallow it up, and so I told Gen'l H. in the interview heretofore mentioned.

3. Do you recollect to have received notice, through the newspapers or otherwise, of the decision of the supreme court,
135 in said cause; and, if so, how long before the adjournment of the term of supreme court at which it was decided? Did your father, George W. Winchester, know of the decision at or about the same time you did? Were you or were [you] not living together at that Dec. 2, '76, keeping the same office and practicing law in partnership?

interrogatory. I will say further that these matters have been the subject of most anxious thought to me, in respect to which I have earnestly striven to remember every fact and circumstance bearing upon them ever since I was informed that Mr. Townsend and
128 Staley and Spicer would testify as to an agreement between Mr. Townsend and myself as the charge to be made in the case of Jones *v.* Townsend.

X 3. If two or three witnesses swear positively that a certain conversation occurred between you & Mr. Townsend in reference to your employment in this Jones case, would you not be disposed to doubt the accuracy of your memory when it is in conflict with their testimony?

Ans. As I have already said, there is an entire absence of recollection on my part of any interviews in which the subject of fees was spoken of in Mr. Townsend's office, but, as I do positively recollect facts and circumstances (those which I have detailed in my examination-in-chief) which are irreconcilable with the
129 existence of any such understanding or agreement, I must state that I am not disposed to doubt the accuracy of my memory, except as heretofore stated in answer to cross-inter. 1; as an abstract proposition, however, I would have to answer the question in the affirmative. In the particular case I am compelled to believe that these gentlemen are mistaken, and that they did not comprehend the purport of the conversation, and I am positive that I did not correctly apprehend the proposition if any such was ever intended to be made.

X 4. When you were employed to attend to the Jones suit, the cross-bill that was afterwards filed was not in the contemplation of
130 the parties, was it, and *and* therefore that was not in express terms embraced in your contract with Mr. Townsend; is this not so?

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And further deponent saith not.

W. L. SCOTT.

STATE OF MISSOURI, *County of St. Louis:*

This 23 day of Oct., A. D. 1880, W. L. Scott appeared
131 before me and subscribed the foregoing depositions in my presence, &, being first dnly sworn by me, stated that the answers to the interrogatories and cross-interrogatories therein contained are true & correct. My term of office expires April 28, '82.

[NOTARIAL SEAL.] JAS. P. MAGINN,
Notary Public.

Deposition of T. P. Winchester.

Taken before Jos. S. Miller, J. P., Dec'r 1, 1880, in county [of] Sebastian, State of Ark., by consent. Exceptions reserved for competency and relevancy, &c. Filed Dec. 4, '80.

By def'ts:

1. Please state whether you at any time had a conference with any member of the firm of Heiskell, Scott & Heiskell after you were appointed assignee in bankruptcy of D. H. Townsend
132 as to the further prosecution of the suit of Jones *v.* Townsend; and, if so, what did you propose as to the suit; did you offer to pay for the services to be performed out of the bankrupt estate, or did you say that after advising with your father you declined to do so and suggest that the firm should go on with the suit and look to the recovery for their fees; or, if not, what did you propose, if anything, in relation to the suit? State, also, what was said, if anything in reply to your proposition.

Ans. I had a conversation with Gen'l J. B. Heiskell, a member of the firm of Heiskell, Scott & Heiskell, just before the case of Jones *vs.* Townsend was tried in the supreme court—I mean before
133 the term of court commenced. I told him I had no money to pay out of the estate for further services, but that I was sure that I ought to be represented; that if they were willing to look to the recovery for a fee they might go ahead. I did not say that after advising with my father I declined to pay anything out of the bankrupt estate as fees in this cause.

2. Had you in fact, before your interview with said member of the firm of H., S. & H. (if you are sure you had such), held a consultation with your father as to whether you would be justified in paying anything out of the estate to secure the further prosecution of said suit, and upon what ground did your father base the conclusion that it would not be advisable to furnish funds to
134 pay for the further prosecution of the suit?

Ans. I had, before this interview with Gen'l H., talked the matter over with my father, the object being to know whether, as assignee, I had a right to expend the bankrupt estate in doubtful litigation, the fact of taxes and other incumbrances then upon the property being considered. We decided that it was discretionary with the assignee, and I, as assignee, determined not to take the risk, because even [if] I gained the land the encumbrances would swallow it up, and so I told Gen'l H. in the interview heretofore mentioned.

3. Do you recollect to have received notice, through the newspapers or otherwise, of the decision of the supreme court,
135 in said cause; and, if so, how long before the adjournment of the term of supreme court at which it was decided? Did your father, George W. Winchester, know of the decision at or about the same time you did? Were you or were [you] not living together at that Dec. 2, '76, keeping the same office and practicing law in partnership?

Ans. I received notice through the papers of the decision of the case of Jones *v.* Townsend in the supreme court, but cannot say how long it was before the adjournment of the court. I was in the same office with my father in Dec'r, 1876, and I am pretty sure he knew of the decision about the same time I did, but I cannot state positively.

4. Did you or not go to Jackson after the decision, and
136 before the adjournment of that term of the supreme court; and, if so, did you know of the reference for fees? And state at whose instance the inquiry was ordered to be made in the court below instead of the supreme court.

Ans. I do not remember going to Jackson after the decision of this case and before the adjournment of the term at which it was decided. I knew of the reference for fees very shortly after it was made and probably at the time, but I do not know at whose instance the enquiry was ordered to be made in the court below. I have an indistinct recollection of a conversation with some one of the firm of H., S. & H., or probably with F. H. Heiskell, representing them, about a reference in the chancery court, taking of
137 proof, &c., but I cannot say whether it was before or after the reference was ordered.

5. Did your father know of your substitution in the place of Townsend in the decree of the supreme court at the time the order was made or shortly after? Did he know of the order declaring the lien and of the reference to ascertain the fee of Heiskell, Scott & Heiskell in said cause? Did he know of the decree for the lien before the court adjourned? Did he know of it while the reference was pending? Did you confer with him in reference to the inquiry as to the fee while the same was pending?

Ans. I do not know whether my father knew of my substitution in place of Townsend in the decree of the supreme court, at
138 time it was made or shortly after, or not. I talked with him very freely about the matter after the time was set for the reference and pending the reference. I don't know when he first knew of the lien being declared in the decree; I suppose he knew of it while the reference was pending. He took no part in the matter, and only spoke of it when I approached him for advice as to the conduct and management of the reference, about which, as I before said, I talked freely with him.

6. Was there any purpose on your part to conceal anything from your father, or to obtain any benefit for the bankrupt creditors over the beneficiaries of Townsend's trust deed, and did you, in
139 fact, conceal any fact from him in the management of the business, or was the whole matter openly conducted with mutual good faith and frankness between you and him and with a fair understanding of what was done on the part of both?

Ans. I certainly had no purpose to conceal anything from him. I never looked upon him as representing any of Townsend's creditors, either bankrupt or beneficiary creditors; they all had their attorneys; I certainly concealed nothing connected with the business from him, but from [the] time I was appointed assignee until the

estate was all in hand I conferred frequently with him. He never did anything in the whole time but advise me. I attended
140 to all the litigation connected with the estate.

7. Did you in good faith contest for Townsend the fee of H., S. & H. on said reference? Did Townsend know of the reference while it was pending? Did Dunscomb, president of the Hernando Ins. Co., have knowledge of the reference while pending? Did counsel of the said company have knowledge of the fact at that time, and what counsel? Who were the general counsel and attorneys of D. H. Townsend at the time said order was obtained, and before and afterwards?

Ans. I contested the fee of H., S. and H. in good faith on the reference, not for Townsend, but for his estate, which I represented. The papers in the case will show that I was present and cross-
141 examined every witness offered by H., S. & H., and that I introduced quite a number in defence. I think Townsend knew of the reference while it was pending. I remember I wanted to take his deposition, but for reasons of his own he declined to give it. I think I told Mr. Dunscomb of the reference, and I am sure I told Mr. Estes (B. M.), attorney for the Hernando Ins. Co., of it. My father was general counsel for Mr. Townsend before that time. He had no business after he went into bankruptcy.

Cross-examination by sol'rs for compl'ts:

X 1. Please state whether, as assignee in bankruptcy of D. H. Townsend, you ever made an agreement or gave consent to that part of the decree of the supreme court that remanded the case of Jones v. Townsend to the chancery court to take order in relation
142 to the fund mentioned in the decree, and to take an account and make a report of the reasonable counsel fees of Heiskell, Scott and Heiskell, or whether you asked that said account should be taken in the chancery court.

Ans. As I remember now, I knew nothing of that part of the decree relative to a lien for fees of counsel and a reference to ascertain the amount of the fee. I was very solicitous about one part of the case; that was my substitution as assignee instead of Mr. Townsend. I remember that in the conversation I have before referred to with Gen'l Heiskell before the case was tried I requested him to make the substitution. I did not ask that said account for fees be taken in the chancery court.

143 X 2. Were you, in fact, in Jackson when said decree was prepared or entered, and was said decree submitted to you before it was entered?

Ans. I was not in Jackson when the decree was prepared nor when it was entered, and I never saw it until the *procedendo* came to the C. & M.

X 3. If you say, in answer to questions-in-chief, that Dunscomb and counsel of Hernando Ins. Co. had knowledge of the reference to the master to report counsel fees while it was pending, please state whether or not after looking into the matter the said company and its counsel declined to enter an appearance in the case or to have

anything to do with it, because they did not intend or desire
144 to be bound by the proceeding; state about this what you remember.

Ans. I remember that when I talked to Mr. Estes, counsel for the Hernando Ins. Co., about the matter, and told him of the reference and urged him to come in and help me, he told me he did not believe Messrs. Heiskell, Scott & Heiskell had a lien on the land and that he did not intend to make the company a party to the proceeding; that he did not think his client interested in that fight. This is my recollection of the reply I got when I asked for assistance. Of one thing I am sure. I saw nothing for the estate I represented and I gave up the fight and allowed the report of the C & M. to be confirmed.

145 X 4. Did your father, as trustee under D. H. Townsend's trust-deed, enter an appearance in the case of Jones *v.* Townsend, or take any steps to contest Messrs. Heiskell, Scott & Heiskell's fee, or in any manner conclude himself legally — by the decrees in that case?

(Counsel for resp'ts except to the latter clause of this question as involving a conclusion of law.)

Ans. My father took no steps in the matter in any capacity. He did not enter an appearance in the case.

X 5. When did your father die? And state whether or not he was residing in Memphis when the decree in Jones *v.* Townsend was entered in the supreme court in December, 1876, and when the order of reference as to Messrs. Heiskell, Scott & Heiskell's fee
146 was being executed.

Ans. My father died Dec'r 31, 1878. He was residing in Memphis at the time indicated.

X 6. If you say that your father knew of the proceedings mentioned in 5th direct question, please state whether there was any proceeding taken to make him a party to that suit, so as to bind him by the decree, and whether the question of his duty or right to become a party was discussed or thought of, so far as you know.

Ans. I know of no proceedings taken to make him a party to the suit. The question as to his becoming a party to these proceedings in any capacity was never presented or discussed in my hear-
147 ing; I never thought of it.

X 7. Please reflect and state anything that you know or can remember that will benefit the complainants in this suit or that in your opinion will benefit them.

Ans. I know of nothing.

X 8. Were you present at the sale of the property in controversy when it was purchased by Messrs Heiskell, Scott & Heiskell for the amount of their fees? And state whether any one was willing to pay for the land more than then bid.

Ans. I was not present at the sale.

X 9. State whether or not you made diligent investigation and enquiry about the value of this land at or near the time of
148 the sale, and whether, considering the depreciation in real es-

tate, the price paid by these gentlemen for it was about its market value or about as much as it could be sold for at the time.

Ans. I took proof as to the value of this land on the reference heretofore alluded to, just before the sale, for the purpose of reducing the fee claimed by H., S. & H.; got the best men I could find in the vicinity of the land. I think ten thousand dollars was as much as it could have been sold for under the most favorable circumstances at that time.

Re-examination:

1. Did you or your father either ever entertain or express any doubt that you, as assignee in bankruptcy of D. H. Townsend, was the proper party to be substituted as defendant in the case of
149 Jones *v.* Townsend?

(Excepted to.)

Ans. The question was never discussed; tt was never raised; I thought I was a proper party.

2. Did you ever make any other investigation of the value of this tract of land than that made in taking proof on the reference as to the fee of H., S. and H., and what was your policy as an attorney in the taking of that proof; was it to prove the value as high as you could or as low as possible?

Ans. I never made any other investigation than that in taking proof upon fee of H., S. & H. My policy as an attorney was to get at, as near as possible, the real value of the land at the date of the recovery.

And further dependent saith not.

T. P. WINCHESTER.

150 STATE OF ARKANSAS, *County of Sebastian:*

Subscribed and sworn to before me this Dec'r 1, '80.

JOSEPH S. MILLER, *J. P.*

Deposition of C. W. Heiskell. Filed Jan. 24, '81.

By def'ts:

1. Are you the C. W. Heiskell mentioned as defendant in this case and a member of the firm of Heiskell, Scott & Heiskell?

Ans. I am the C. W. Heiskell mentioned as one of [the] defendants in this [case] and was a member of the law firm of Heiskell, Scott & Heiskell, which firm was composed of J. B. Heiskell, W. L. Scott, and myself.

2. State what you know concerning the employment of your said firm as att'ys of D. H. Townsend in regard to the Jones land,
151 both before and after the filing of the bill of Annie L. Jones *et al. vs.* Townsend.

Ans. It has been so long since the matters inquired about have transpired that I cannot pretend to state fully, but I will give my best recollection. Some time before the filing of the bill of Jones *v.* Townsend (Feb'ry 16, '69,) D. H. Townsend employed our firm to

get for him the possession of the land in controversy, and probably to clear it of taxes, &c. He had previously bought it at execution sale upon a judgment recovered by him against Jones in his lifetime (Jones was dead when we were employed) at some 12 or $1,500—the bill will show—and the time of redemption had run out. The widow of Jones was on the place, and with her some children—
152 I think two sons pretty well grown, according to our information. It was a matter of frequent conversation in the office and of consultations—several is my impression—whether we should not at once take possession of the property. I am certain we so advised Townsend, and in order that there should be no difficulty about it, or slip made in retaining possession, we got a Mr. Etter, whom I knew to be every way reliable, to take charge and hold for Townsend. There was also another man, whose name I do not remember, who went into possession under our advice, the possession having been obtained of the land under the sheriff's writ, as I recollect, but in this my brother, J. B. Heiskell, corrects my recollection—that it was not under a writ that we took possession. Mrs. Jones still occupied part of the land, and
153 was, as we were informed, committing waste. This, my impression is, we proposed to stop by a bill of injunction, which was either prepared or determined on when the bill of Jones *v.* Townsend was filed, and it, amongst other things, asked and injunction against Townsend to stay waste. This bill we answered on the second day, I think, after it was filed, and in the answer, by way of cross-bill, amongst other things, we asked an injunction to stay waste, both of which injunctions were granted. Previous to the filing of the Jones bill, however, the question of taxes and tax-title *were* settled through our labor and advice. As to these, however, I deem it proper to state that Mr. Scott's deposition is
154 more full than I can be and it may be that my knowledge of them (the taxes and tax-title) are wholly derived from this instead of from my own recollection. After the filing of the Jones bill we advised Townsend to buy Mrs. Jones' dower interest in the land. The number of conferences and consultations on this point I don't pretend to state, but my recollection is there were several. Under our advice he did purchase this interest at the price stated in the Jones-Townsend case. During all of this time we had been paid very little, except that our Mr. Scott got from Townsend some fire-wood; our books will show the amounts paid. My impression is we applied for payments as the work progressed, but without success, except as above stated. The amount of the fee was never fixed to my knowledge.

155 3. State, if you remember, what was the custom of the firm of H., S. and H. in regard to fixing fees.

Ans. It was a custom in our office to fix fees after a consultation together; most frequently this was only done after our work was done or nearly so; if this rule was ever departed from it was very seldom; if one of us fixed a fee with a client it was almost if not the invariable custom to report it to the office for approval; I can recall but one departure from this, where my brother, J. B. Heiskell,

agreed upon a fee with a client by the name of Turley, as Turley insisted when we came to settle, and we settled on that basis.

4. When did you first hear that Mr. Townsend claimed to
156 have made a contract with your firm to attend to the case of Annie L. Jones *v.* D. H. Townsend for the sum of one thousand dollars?

Ans. The first time I ever heard of Townsend's claiming to have made a contract with our firm to attend to this cause for $1,000 was when the account for our fees was being taken in the cause of Jones *v.* Townsend. Mr. T. P. Winchester, who was the opposing counsel and who attended to the taking of the account against us, stated to me after our proof was in that he proposed to prove that Mr. Scott agreed to attend to the case for $1,000. I expressed my surprise and told him Mr. Townsend could prove no such thing, as it was not the fact. He then said that I said he could do so by Staley
157 and Spicer or by two witnesses; I am not certain which besides himself, Townsend. I told him to bring them on and examine them, but he never did so, and I supposed the attempt had failed. I am quite confident that I never heard of this thousand-dollar fee before this and am as confident I would have heard of it if our Mr. Scott had made any such agreement. I say this from his conscientiousness in regard to such matters and the custom of the office, and also from the fact I thought the fee should be so much greater that I think I should be impressed with such an announcement, and, further, from the fact that, while the amount of this fee was never fixed, to my recollection, our Mr. Scott, as well as
158 the rest of the firm, always regarded the firm as entitled to a large fee in the case, greatly more than one thousand dollars.

5. State whether or not you and the other members of the firm ever talked about the fee in the case of Jones *v.* Townsend; and, if so, what was the tenor of the conversation?

Ans. We had frequent conversations about this cause and about the large fee we would get if we gained it; we talked about the difficulty of the case, the amount of labor we had done, which was very great, the large recovery for our client, and the small amount he had paid out, and we never thought of a $1,000 as the amount we were entitled to if we succeeded; I can only say further
159 on this point that I fully concur in what Mr. Scott has said in his deposition about it.

6. Did you ever at any time as a member of the firm of H., S. & H. agree to attend to the Jones & Townsend case for $1,000, or did you ever understand that the firm had agreed to that or any amount as a fixed fee?

Ans. I never did.

7. Did you have any conversation with any of the complainants or parties representing them, while the account to determine fee of H., S. & H. was pending before the clerk & master, in regard to said fee and account? If so, state with whom and to what effect.

Ans. Yes, while this matter was under investigation, and
160 I am of the impression after our proof as to the amount of

the fee, $5,500; but in this impression I am not positive. I went to Mr. S. H. Dunscomb, pres't of the Hernando Insurance Company, and either told him what our fee was by our proof shown to be, or that we were taking the proof and wished to know whether his company would contest the fee or pay it. He replied that I would have to see the Hernando Insurance Company's lawyer, Mr. M. Estes, and whatever he advised they would do. I went at once to Mr. Estes' office and told him of the conference between Dunscomb and myself and asked him if he was going to contest our fee. He said he had not examined the papers, but would look into the
161 matter and give me an answer. I urged his early examination and requested that if he could consistently he would advise his client to settle with us without further proceedings, as I needed my part of the money. Several days after this I called again on Mr. Estes and he replied to my question, what was he going to do? "You go ahead." I state again I am not certain at what stage of taking the account for our fee this conversation occurred—whether just before the account was commenced or after it was nearly closed, or after it was closed and was about to be confirmed; I think probably the latter; but I know that both of these gentlemen were informed by me of its pendency and requested to settle with us without further litigation, and that Mr. Estes
162 said after he examined the papers, "go ahead"; at least, he said this after my request to him to look into them and let me know. I am confident he told me [he] had examined the case when I returned the second time; yet I may be mistaken, for it has been some time ago and my memory is not good. We then had the report of the clerk confirmed and the land ordered sold. On the first day set for the sale Mr. Estes & Dunscomb were both present, and we thought they would bid our fee and end the matter; but this failed to—and left the place of sale be— it was actually made.

8. Did you have any correspondence with any of compl'ts or parties representing them shortly before the time for redemption
163 of said land? If so, state with whom and what it was, and if you have any letter please produce it.

Ans. After the sale and after our purchase, when the time of redemption had nearly expired, we all having left Memphis to escape yellow fever, I being at Rogersville, E. T., with my family, I received a note from Mr. Dunscomb, who was then in Va., asking me: (1) What am't will you take in payment of your fee? (2) When does the time of redemption expire? And (3) when should we pay the money to redeem? I answered him: We will take our fee as allowed by the clerk and interest thereon up to the present time, if the amount is paid before the time of redemption expires,
164 but if not paid before that time expires we will not accept the fee at all, and that if he would send me or my brother, J. B. Heiskell, a check for the amount it would be satisfactory if sent before the redemption run out, and that I did not know when the time of redemption did run out, nor do I now know. This is the substance of this correspondence. I did not keep and have lost Dunscomb's letter to me, and if he has my answer I think it will be

found to be in substantial agreement with the above. Mr. Nelson, the secretary of the Her. Ins. Co., was at that time, as his note (I think postal) showed, at Marion, Va., and his postal was about to the same effect, as I remember, though of this I am not so
165 positive as having written to the president of the company. I did not pay so particular attention to this communication, and my answer was, I think, to about the same effect as to Dunscomb. I did not preserve and have lost this communication also.

9. Did you or any member of the former firm of H., S. & H. have any conversation with said compl'ts, or parties representing them, after the time for redemption expired; and, if so, to what effect?

Ans. After we all returned to Memphis, and after the time of redemption had run out, Mr. Dunscombe asked me again what I would take in payment of our fees, and I again replied: We will take our fees as fixed by the clerk, and interest. I said fur-
166 ther: I want you to distinctly understand that I regard our title to the land as good and undoubted; but if you will pay our fee we will be content. Either in this or another interview he asked me if we would not take $3,000, and I answered no. He said our fee was too large, and I told him that under the circumstances of the case I did not think so; that as our client, Townsend, was to get no benefit of the recovery I did not feel called upon to abate anything from what competent witnesses had allowed us, especially as he had full opportunity to contest the amount and had failed to do so.

10. Did any of the officers of the Hernando Ins. Co., their attorney, or any one ever estimate to you that it was or would be
167 insisted for said company that H., S. & H. had no lien on this land for their fee before said land was bid off at the sale for your firm?

Ans. None of them nor any one else; on the contrary, when I left Mr. Estes after my second interview above spoken of my impression was that, while he would not advise them (the company) to pay their fee, they would make no resistance to our getting it in the courts, and I thought and believed, when I went up to the sale when the land was advertised, that Mr. Dunscomb was there to bid the amount of our fee, pay it, and thus get us out of the case.

11. Examine the attached statement; compare it with the
168 books of H., S. & H. and state whether or not [it] embraces all the entries in regard to D. H. Townsend's ac.; explain how it came that the whole amount paid by Townsend was not credited on the $5,500.00 fee.

Ans. In answer to this question I would state that all of the items, both of debit and credit, in the hereto-attached statement, marked Exhibit A, to this deposition appear on the books of Heiskell, Scott & Heiskell, and all of them, except the third ($25 item) are in the handwriting of W. L. Scott. These are all of the credits allowed Townsend by our firm, and all that he is entitled to so far as my knowledge extends. If other credits were allowed by any member of the firm I suppose Mr. Townsend can produce the vouchers. We allowed on the $5,500 fee a credit of $200. When this credit

was made I was on the circuit court bench, and my nephew, F. H. Heiskell, attended to the taking of the account and gave the credit of $200. I suppose he credited the items of account first made with the items of credit first given, this is my recollection of my directions in this regard; but this he can explain. According to this there should be a further credit on the $5,500 fee of $30, as the amounts debited on the books up to the time of the entry of our retainer fee for defence of this suit, Jones *vs.* Townsend, is $175, and the credits $405, making $230 instead of $200 to be credited on this part of our fee. It is needless to add that if the litigation had not sprung up and we had recovered the land the amount of $175 would not have been our whole fee, but it would have been larger.

Cross-examination:

X 1. In your direct examination you detail a conversation that you say you had with Mr. Estes, in which you state that he answered your question, "You go ahead." Are you positive that this was the exact language used, and that this was all that was said?

Ans. I am not positive of the exact form of expression and thought I had so stated in my examination-in-chief, and while my impression is very distinct and clear that I use in chief Mr. Estes' exact words, I do not wish to be understood as giving the exact form of expression positively. It was the form then given or some equivalent expression, and so far as I remember it was all that was said.

X 2. Are you positive that you only had one conversation with Mr. Estes about this matter while the reference to the master was pending, and that you have stated all that passed between you and Mr. Estes in reference to the matter?

Ans. No; I am not. I stated in my examination-in-chief that I had two conversations with Mr. Estes, and while I am very confident these are all, yet I may be mistaken; the matter may have been mentioned otherwise between us, but I do not recall even this. I certainly intended to state all that passed between Mr. Estes and myself, and think I have done so in substance fully.

X 3. Did you not understand at the time that Mr. Estes was investigating the record and papers in the suit in order to advise his client whether it was best for its interest to become a party to the suit, and whether it or the creditors claiming under the trust deed were bound by the decree of the supreme court adjudicating the lien of Heiskell, Scott & Heiskell?

Ans. I most certainly did not, and never thought of such a thing. If Mr. Estes had intimated such a point of defence I feel quite sure I would have been impressed by it and would have remembered it, and I never knew or thought of this point being entertained at that time as a defence for his client, nor did I hear of it until long after the sale to us, and I think not until a short time before this suit was brought. The amount of the fee was the only thing I understood there would be a contest about, if there was one,

and after the interviews with Mr. Estes I understood that he did not intend to contest that, but let the court fix it.

X 4. Are you not mistaken in saying in your 7th answer that on the first day set for the sale Mr. Estes & Dunscomb were both present?

Ans. I do not think I am mistaken. My recollection is very distinct that on that day I saw Mr. Estes & Dunscomb standing near the court-house door or just moving away from it as I came
174 up. The sale was postponed shortly after I came up, and it may be that they were leaving the court-house, and I took it that they were leaving the place of sale. I say in chief "and left the place of sale before it was actually made." I correct this—the sale was not made, but postponed that day. They left as I came up, or about the time I came up, I think.

X 5. Are you prepared to state positively when you first heard that the attorneys of the Hernando Ins. Co. entertained the opinion that Heiskell, Scott & Heiskell had no lien on the property or doubted whether they had a lien.

Ans. No; I cannot state the exact date, but certainly I never knew of the matter enquired about in this question until after the sale to us, and my best recollection is until more than two
175 years after this, and not until a short time before this bill was filed.

X 6. Do you not remember that in one of your conversations with Mr. Dunscomb before the suit was brought he said to you in substance that he was advised that Heiskell, Scott and Heiskell had no lien on the property, and that the rule was that an attorney never had a lien for defending a suit?

Ans. I think this is so, but this was long after the sale to us, but I am sure that he never told me then, or at any time, that he or his company or its attorney entertained this view at the time we bought or previous thereto. I do not recollect when this conversation occurred, but think it occurred after the time of redemption had
176 fully run; of this, however, I may be mistaken.

X 7th. Do you not remember that F. M. Nelson, secretary of the Hernando Ins. Co., in a conversation with you before the institution of this suit, made substantially the statement contained in the last question?

Ans. I do not remember this, but do not say it did not occur. If it did occur it was long after we bought and not long before this suit was brought. I say this, however: I am very confident of such a thing had been notified to me at or near the time of our buying the land at the clerk's sale I would have remembered it.

X 8. In the copy of your account against D. H. Townsend,
177 filed as exhibit to your deposition, I find no entry charging Townsend for services in the case of Wm. E. Jones, except that of Sept. 23, 1869, as follows:

"D. H. Townsend, Dr.

"To retainer in defense Wm. E. Jones' heirs *vs.* you, in chancery court, $500.00."

Is this the only entry relating to the case on the books of Heiskell, Scott & Heiskell?

Ans. The account as exhibited shows all of the entries on the books of Heiskell, Scott & Heiskell.

X 9. Was not this entry made about the time that the Jones suit was begun, and who made this entry? Look to the books and state in whose handwriting it is.

Ans. It is in the handwriting of W. L. Scott. It was made
178 at the date shown in the account, Sept. 23, 1869, as shown on the books. The answer and cross-bill of Townsend to the Jones bill was filed Feb'ry 16, 1869. I mean to say that the books show the entry to be of that date, and, from the entry preceeding and following this one, I think it was made at the date this purports to be.

C. W. HEISKELL.

Sworn to and sub[scribed] before me Jan'y 24, '81.

R. J. BLACK, *C. & M.*

Ex. A to C. W. Heiskell's dep.

Copy from ledger of H., S. H., D. H. Townsend.

1868.			
Dec.	To am't—78		100 00
1869.			
Feb'ry 4.	" 83		50 00
M'ch 6.	" 89		25 00
Sept. 23.	" 103		500 00
1869.			
179 May 8.	By am't—92		50 00
Sept. 22.	" 103		50 00
1872.			
Sept. 3.	" 147		255 00
1873.			
Oct.	" 156		50 00

Copies of Entries on the Journal of H., S. H.

Page 78.

Dec. 20, 1868—D. H. Townsend, Dr.

To drafting deed from sheriff to you of lands bought at execution sale of Townsend *v.* W. E. Jones and for investigating title to the lands and getting the release of tax titles and procuring certificate of redemption, —

Page 83.

Feb. 4, 1869—D. H. Townsend, Dr.

To additional services in the matter of W. E. Jones' 640-acre tract, advice drawing lease and agreement with Thos. Farrar, pre-
180 paring injunction bill, drafting an agreement between you and W. W. Etter, 50.00

Page 89.

Mc'h 6—D. H. Townsend, Dr.

To drawing deed from Mrs. W. E. Jones to him for her dower interest in the estate of W. E. Jones, dec'd, 25.00.

Page 92.

May 8, 1869—Cash, Dr., to D. H. Townsend.

To am't paid on fees for services in relation to lands purchased at shff's sale in case of D. H. Townsend *v.* W. E. Jones, & dec'd, &c. 50.00.

Page 103.

Sept. 23—Cash, Dr., to D. H. Townsend.

Am't paid on fees in case of Jones *v.* Townsend, No. 3400, chancery court of Memphis, 50.00.

181 Sept. 23—D. H. Townsend, Dr., to W. L. Scott.

Am't paid sending package to sh'ff Davidson Co. copies of X bill, 1.50 pd.

Sept. 23—D. H. Townsend, Dr.

To retainer in defence case W. E. Jones' heirs *v.* you in chancery court, 500.00.

Page 147.

Sept. 3, 1872—Cash, Dr., to D. H. Townsend.

Am't paid, from time to time, up to this date (in wood to W. L. Scott from Dec., 1869, to Sept. 13, 1872, as per acc't rendered), 255.00.

Page 156.

Oct., 1873—Cash to D. H. Townsend, Dr.

To am't paid on ac., 50.00

Deposition of F. H. Heiskell. Filed Jan'y 31, 1881.

Statement for resp'ts.

182 I am the son of J. B. Heiskell. When the case of Jones *vs.* Townsend was decided in the supreme court and sent back to the chancery court for the purpose of fixing the fee of H., S. & H. I took charge of it, had the reference made, and attended to the proceeding until the land was sold and bought in for the fee. When the decision of the supreme court was first announced J. B. and C. W. Heiskell were in favor of taking the account in the supreme court. My understanding was that Winchester wanted the account taken in the ch'y c't. I understood, I think, that he requested it sent back, so that he could have time and opportunity to watch if necessary to contest the matter, but of this I am not certain. If

he did not suggest it, I know he willingly consented to it.
183 The decision was pronounced some ten days or two weeks before the supreme court adjourned, and the idea of H., S. & H. was to have the reference in the supreme court, have the fee fixed, and final decree entered at that term. My understanding was that Winchester objected to this. I am pretty sure he expressed dissatisfaction with the plan to me. I know that H., S. & H. abandoned this idea in order to allow a full opportunity to contest the fee. Before the case was tried in the supreme court I advised with H., S. & H. in regard to the expediency of filing a claim against the bankrupt estate of Townsend with his assignee, but it was concluded not to do so, as it might prejudice their lien on the land in
184 case of recovery, and as the estate of Townsend, it was thought, would not pay more than 30c. on the dollar. After the reference was ordered in the chancery court I had frequent conversations with J. B. & C. W. H. They were very solicitous to have all parties notified of the reference who had any interest in regard thereto. They did not deem the Hernando Ins. Co. necessary parties to the reference, but determined they should be notified and have full opportunity to contest the fee. I did not speak to Mr. Dunscomb, but understood, I think, from both C. W. Heiskell & Winchester that he knew of the account. I spoke to Mr. B. M. Estes before the account was closed and asked him if I should have the account held open longer for the H. Ins. Co. to come in and contest the fee; the account had then been
185 pending for some six weeks and he gave me to understand that I need not wait any longer on them. After the C. & M. had made his report as to the fee I drew an order confirming it and asked Mr. Estes to consent to it. He replied that "he was not in a situation to consent to the order," but said for me to "go ahead and take the order;" that he "would not resist it." Before this assurance to the contrary I thought, and so did H., S. & H., that the H. Ins. Co. would resist their fee either on the reference or on motion to confirm the report. The impression made on my mind was that the said Co. did not intend to question the fee, and I was much surprised to learn from T. P. Winchester's deposition, taken
186 only a few days ago, that counsel for said Co. entertained at that time (the time of the reference) the opinion that H., S. & H. had no lien and contemplated at that time a contest on that ground. If I had known this or suspected it I would have had them made parties and brought into the reference before it was closed. Mr. Estes said he thought the fee too large, but would not resist the order to confirm the report. On the day said land was advertised to be sold to satisfy the fee, just about 12 m., or a few minutes before, Mr. Estes & Mr. Dunscomb came rather hurridly into the clerk and master's office and asked for the papers or decree of sale in the case of Jones *v.* Townsend. Then, seeing me, Mr. E. asked whether the decree in question cut off the equity of redemption. I replied
187 that it did not; that I had not drawn it so on purpose, not thinking it a proper case to bar the right. He then turned to Mr. Dunscomb and smiling said that they need not wait any longer; "that

gives you two years." I was much nonplussed, as I confidently expected the H. Ins. Co. to bid at the sale and to bid the amount of the fee of H., S. & H., and I knew that J. B. & C. W. H. so expected. So completely had I miscalculated that I had the C. & M. to hold up the sale until I could consult my clients. Finding C. W. H. in a few minutes, we concluded, as there were no bidders present, to postpone the sale for a week, I believe, and had the clerk so announce. It was only when they found no one would bid their fee and take the
188 land that they agreed to bid it in. Pending the account Winchester said he could prove that Judge Scott had agreed to attend to the case for $1,000.00. I was much surprised, as I had often heard the firm talk about this case as a very doubtful case, and one in which they would get a large fee if they gained it. I wrote to Judge Scott and he indignantly denied it. I told Winchester to make his proof; that I would resist it when the fee was fixed. I examined the books of H., S. & H. to see what amount had been paid by Townsend. I also called upon Winchester to furnish me a copy of the account from Townsend's books, so we could compare them and enter a proper credit on the fee. He failed to do so. I entered what I thought from the books was as much as or more than
189 this fee was entitled to be credited with. I found amounts charged prior to this fee $175.00; whole amount paid, $405.00, leaving balance of $230.00; but as there was [a] decree against Townsend's estate for costs, and as I thought H., S. & H. would have them to pay—that is, the costs of reference and sale—I thought a credit of $200.00 was more than the fee was entitled to; I may have been wrong in this. That was my reason for making the credit as I did. The statement marked Exhibit "A" to C. W. Heiskell's deposition is a true and full copy from the books of H., S. & H. of all entries in reference to D. H. Townsend's ac. Some time before the death of Maj. Geo. Winchester J. B. Heiskell had a conversation with — the law library, at which I was present. I don't
190 remember whether it was before or after the decision of the supreme court in the Jones *v.* Townsend case, but I think not far from the time of said decision. They were discussing the deed of trust given by Townsend to secure May & Staley for what they might be compelled to pay, in which deed Maj. Winchester was trustee. The point under consideration by them was whether or not the creditors of Townsend could avail themselves of this security. In the course of the conversation Maj. Winchester stated that he drew the deed of trust and said that he did not know whether he had accomplished his purpose when he drew the deed of trust, but that it was the purpose of himself and client, Townsend, to give only a
191 personal security to May & Staley for what they should actually be compelled to pay, and not to give a security that would enure to the creditors; that he did not know how a court would hold if it came to a contest, but that he had drawn the instrument as tightly as he knew how, in order to accomplish this end. I think I give very nearly Maj. Winchester's exact language. I am sure I do not vary by a shade the meaning of what he said. From the conversations and from consultations with members of the firm of H., S. & H. I know

they did not admit the right of the Hernando Ins. Co. or other like creditors to any benefit under said deed of trust, but for the purpose of settling the claim said creditors were insisting on they were
192 willing to admit them to contest the account or except to the report.

Cross-examination:

X 1. Did you not, in fact, leave the matter of reference before the master open that Mr. Estes might have time to look into the record and papers in the case, in order to determine and advise the Hernando Ins. Co. whether it should come into that suit as a party or not?

Ans. The reference was held open in order to give T. P. Winchester time to take proof after I had taken proof for H., S. & H.; there was considerable delay on Winchester's part in getting his witnesses; during this time we endeavored to get the H. Ins. Co. either to contest the fee on the reference or to say they would
193 not do so, in order that there might be no delay or complication after the reference was closed; but I did not think of the company making any contest, except as to the amount of the fee; when I was done waiting on Winchester I had the account closed, Mr. Estes having told me not to wait on them.

X 2. Did you not understand or suppose that Mr. Estes was examining the papers in order to decide as a lawyer whether the trustee and creditors under Townsend's trust deed were barred by the proceedings and decreee in that cause?

Ans. I did not; my idea was at that time that Mr. Estes did not differ with H., S. & H. as to the legal effect of the proceedings upon the creditors under the Townsend trust, and I only con-
194 sidered Mr. Estes as deciding whether his client should dispute the amount of the fee on the reference or let the matter rest on the proof taken by Winchester; I would not have been so sure the H. Ins. Co. was going to bid the fee and take the land if I thought it advised not to resist the fee on the ground indicated in the question.

X 3. When did you first hear that Mr. Estes entertained doubts whether Heiskell, Scott & Heiskell had a lien on the property in controversy under the proceedings in Jones *v.* Townsend, and who told you?

Ans. I cannot state more positively than to say it was after the epidemic of 1878; I remember this from the fact that it was
195 after my father and I had moved into our present office, which was in Nov., 1878; I cannot say how long after this it was; I think T. P. Winchester told me.

X 4. In stating the conversation that occurred between you and Mr. Estes in your direct examination do you intend to be understood as stating the exact language used or your recollection of the substance of it?

Ans. In stating said conversation I intended to indicate by quotation marks so much, and felt justified in testifying to, as the exact language used. As to the rest I only meant to state the substance of

what was said. I may be mistaken, but do not think I am, as to the exact language; I only indicate as to the words used—
196 those I remember distinctly. I see that the words so indicated, coming on in the midst of sentences, include verbs and pronouns in the third person instead of the first, of course they should be read with this change.

X 5. Please answer the second and third X interrogatories propounded to J. B. Heiskell, Esq.

Ans. The question of practice as to how it would be proper to bring the H. Ins. Co. into court was not considered. I suppose the right of the creditors under the Townsend trust deed as against the fee of H., S. & H., on the question whether said creditors had any such rights, could have been disposed of in that case as well as in this. I did and do think that said creditors are concluded
197 by the decree of the supreme court, but knowing that the desire of H., S. & H. was to have all controversy as to the fee settled at that time I think I would have insisted on making the trust creditors parties if I had know- that they considered that the decree and reference did not bind then.

And further deponent saith not.

F. H. HEISKELL.

Sworn to and sub. before me, Jan'y 31, '81.

R. J. BLACK, *C. & M.*

Deposition of J. B. Heiskell. Filed Feb'ry 7, 1881.

1 Look over the questions propounded to C. W. Heiskell in the foregoing deposition and answer such of them as you are able.

2. What is your recollection in regard to the reference as
198 to fee of H., S. & H. being ordered in the chancery court; at whose instance was it so ordered?

Ans. I am the J. B. Heiskell who was a member of the firm of Heiskell, Scott & Heiskell. I do not remember to have had any personal knowledge of the employment of our firm by D. H. Townsend, except what was derived from W. L. Scott, with whom the interviews were had with Townsend when the firm was retained in the Jones & Townsend case. The custom of our firm was to report fees when agreed upon with clients, and to consult in regard to fees where they were not fixed. Capt. Scott was particularly scrupulous and exact in his habits in this respect. I am sure he never did report to the firm, or at least to me, any arrangement with
199 Townsend to attend to the Jones cases for one thousand dollars, and am equally sure that if such a proposition had been made or accepted he would have reported it. I am confident I never heard of this as having been proposed or accepted until during the reference to ascertain the fee. I heard that Winchester intended to contest our fee on that ground. I was surprised that any such defence should be set up. It was denied by us and Mr. Winchester did not press the defence. He had full opportunity to do so. I had never heard up to that time of such a proposition.

In all our conversations as to the fee in the cases we regarded the purchase of Townsend as a speculation in which, if successful, he was getting a large property for a small sum and considered that we would be justified in charging him a large fee and
200 4,000 or $5,000 *was* the sums we discussed. I had no conversation with any of the parties that I remember while the account was pending; nor did I have any correspondence with the parties as to the redemption. I heard of a letter to my brother, C. W. Heiskell, from Mr. Dunscomb and of his reply, but did not write or receive any letter. No one of the officers of the Hernando Ins. Co. ever intimated to me that they contested our lien for the fee. I had no conversation with them, but from the reports of my brother & son of what took place I regarded them as acquiescing in the steps that were being taken. If they had intimated that they did not intend to be bound by our proceeding I am sure we would have taken steps to bring them before the court as a means of settling
201 the matter beyond any possible doubt. My understanding of the matter was that the officers and counsel of the Co. were fully apprised of what was being done and did not desire to make any other defence than was being made. Every opportunity was given them that could have been by making them parties, and we confidently expected them to make any defence they might have then and in that proceeding. My son was requested to give them notice to except if they were not satisfied with the report. My memorandum book shows that the Jones-Townsend case was decided on the 2nd of December, 1876, and that the court continued in session until the 12th of December. It may have continued a day or two longer. My recollection is that T. P. Winchester, the assignee
202 in bankruptcy of Townsend, was consulted as to where he would prefer the enquiry as to the fee to be made, and that it was made at Memphis by arrangement with him, and it was my understanding at his express desire. I am confident that during the time that elapsed between the decision of the case and the adjournment T. P. Winchester was in Jackson and in the supreme court, and that the reference was ordered in his presence and with his assent, or mentioned in court in his presence and his attention called to it. I never heard of any objection (I do not think the decree was submitted to him or examined by him) (this in parenthesis written on margin) being made to his authority to represent
203 Townsend and all others claiming the benefits of the recovery, nor any objection to his being substituted in the decree as party. If any such question had ever been made I am sure we would have taken steps to obviate any difficulty that we regarded as at all substantial. Our object was to act in good faith to all parties claiming any interest. We did not admit the right of Hernando Ins. Co., but as they set up a claim we wished them to have any opportunity to which a valid claim would entitle them. We did not desire or expect to become purchasers at the sale, though, of course, we were willing to take it at the bid. We expected to have the land redeemed up to the time of the expiration of
204 the two years, the right of redemption having been sold by

the assignee and bought in by the Hernando Ins. Co. The decisions of the court were at that time published in the newspapers, and the members of the bar were in that way apprised promptly of every decision in which they were interested. They were diligent and prompt in the use of this means of knowledge. The decision of the Jones-Townsend case was announced in the appeal of Dec. 3, 1876, as the files show. The first intimation that I recollect to have had that the Hernando Ins. Co. and their counsel entertained the idea of not being bound by the proceeding at the time it was going on was when Winchester's deposition was taken, or rather when the interrogatory was put in giving intimation to that
205 effect a few weeks since. I am sure Winchester did not disclose it to me at the time, nor did any of those representing the firm ever mention it to me as being disclosed to them, or as being expected or intimated. We declined to file our claim in bankruptcy against Townsend's estate, because we believed we had a full security by means of the lien on the property recovered. I remember the conversation with Winchester as assignee of Townsend, in which he apprised me for the firm that he could not pay fees out of the estate for the prosecution of the suit, and I agreed to proceed with the suit, looking to the result for compensation. I think Winchester states that conversation correctly in his deposition. My impression now is that he mentioned the fact of
206 having advised with his father, the late Geo. W. Winchester, on the subject, but of this I cannot be positive.

Cross-examination:

X 1. Is it not true that you have given very little, if any, personal attention to the proceedings connected with the Jones & Townsend case since it was remanded to the chancery court by the supreme court?

Ans. I was not personally before the court, or clerk & master, but was in constant communication with C. W. & F. H. Heiskell concerning the matter while it was going on. I was, with W. L. Scott *I was with W. L. Scott*, attending to it in the supreme court.

207 X 2. In your direct examination you say: "If they had intimated that they did not intend to be bound by our proceedings, I am sure we could have taken steps to bring them before the court as a means of settling the matter beyond any possible doubt." Please state in what manner you would have done this, and whether the legal question of the estoppel of the decree of the supreme court, adjudicating the lien of Heiskell, Scott & Heiskell upon the creditors claiming under the trust deed, could not have been as well made in that proceeding after they were brought before the court as in this case.

Ans. My answer was as stated, except that I say "would" instead of "could." I have not considered the question as to the mode. It might have been by petition, separate bill, or suit at law to
208 fix the amount of the fee. I take it for granted that compl'ts could have made the same question in that proceeding as in an independent, such as this one. I do not remember to have con-

sidered the question at that time, as I certainly would have done if that defence had been set up, and my impression is that if it had been made we would have made them parties — of abundant caution.

X 3. Did you not at that time and do you not now entertain the legal opinion that the Hernando Ins. Co. and other creditors under Townsend's trust deed were and are concluded by the decree of the supreme court declaring the lien of Heiskell, Scott & Heiskell?

Ans. I did think and now think that any person claim-
209 ing under Townsend is bound by the order of the supreme court declaring the lien. They had ample time after the decision was made to have taken exception to the decree, and it was incumbent on them to see that the decree was such as they approved. They knew of Townsend's bankruptcy and could not have supposed that counsel were going to let the property pass out of their power without asking for a lien. Winchester, as assignee in bankruptcy, obtained the substitution to the decree and acted as the legal successor of Townsend and did not object to the lien. This substitution of Winchester was never objected to by the present complainants, so far as I heard, nor did they ever attempt to substitute themselves, but allowed the proceeding to go on with
210 Winchester representing the Townsend interest without objection. I think we would at once have made them parties in some way if they had given any intimation that they did not expect to be bound by the action that was then taken. I very well know that it is much safer where a title is concerned to have all claimants before the court, and generally act upon the idea that however clear a point may seem it is better to have a decision between parties than to risk anything upon an opinion that they have no right or are bound.

Further deponent saith not.

J. B. HEISKELL.

Sub. & sworn to before me Febr'y 7, 1881.

E. B. McHENRY,
D. C. & M.

211 *Deposition of E. B. McHenry. Filed Febr'y* 17, '81.

By compl'ts—by consent:

1. Please state whether you are the E. B. McHenry who is one of the complainants and the receiver of the Bank of West Tennessee.

Ans. I am.

2. Please state whether or not, as receiver of the Bank of West Tennessee, you have any demand against D. H. Townsend and Walter S. Staley or against the latter as surety of the former; if so, state the date and amount of the same—the amount of any payment thereon; and state specifically how such demand accrued.

Ans. The judgment mentioned in the bill as belonging to
212 me as receiver was rendered before my appointment as receiver and was in the name of the president, directors, &

company of the Bank of West Tenn. It was rendered Dec. 9, 1873, and recorded in M. B. 8, p. 402, &c. It was against D. H. Townsend, as principal, and C. S. Severson and W. S. Staley, as sureties on said Townsend's appeal bond. The amount of the judgment was $6,844.51. T. P. Winchester, trustee, paid me on that judgment on June 8, 1880, the sum of $951.38.

3. If you state in answer to the last question that you hold a decree against the said W. S. Staley, please state the style of the case and court in which said decree was entered, on what demand or account it was rendered, and copy, as an exhibit to your depo-
213 sition, that portion of the decree that relates to the liability of said Staley and all such portions of such decree, in order that the court may have this matter before it without being incumbered with other matters that may be embraced in said decree. The counsel in the case agree that the copy above requested may be given without making a formal complete copy of the decree.

Ans. The decree and judgment were in the cause of Thos. S. Marr *vs.* The Bank of West Tenn., in the chancery court of Shelby county. The facts in connection with this judgment are briefly these. A judgment had been rendered against D. H. Townsend, as a stock-holder in said bank. From this decree he appealed to the
214 supreme court, giving appeal bond to cover the judgment on which Severson and Staley were sureties. The supreme court affirmed the judgment and remanded the cause to this court, where the judgment of Dec. 9, 1873, was rendered in accordance with the *procedendo* from that court. A copy of that portion of the decree of Dec. 9, 1873, *was rendered in accordance with the* procedendo *from that court a copy of that portion of the decree of Dec. 9, 1873,* which relates to D. H. Townsend, Severson, & Staley, is herewith filed as Exhibit A to this deposition.

Cross-examination waived.

WM. M. SMITH & OTHERS,
For Def'ts.

Being asked by sol'rs for the compl't to furnish that part
215 of the decree of March 20, 1879, which makes me receiver and defines my power and authority, I submit herewith, as Exhibit "B," extracts from said decree which cover these points.

Further deponent saith not.

E. B. McHENRY.

Sub. & sworn to before me Febr'y 17, 1881.

R. J. BLACK, *C. & M.*

(Copy.)

Ex. A.

It is therefore ordered, adjudged, and decreed by this court that the compl'ts in the cross-bill in the case of Thos. S. Marr *vs.* The President, Directors & Company of the Bank of West Tenn. recover the said sums of the parties, respectively, as herein below set forth, the sums to be paid into the office of the clerk and master of

216 this court for distribution amongst the creditors and in payment of costs, expenses, &c., under the orders of the court, to wit:

* * * * * * * *

D. H. Townsend, with C. S. Severson and W. S. Staley, his sureties, will pay $5,912.32, with interest, $922.19, making the sum of $6,844.51, with interest on same from Nov. 7, '73, date of supreme court decree.

* * * * * * * *

A true copy from M. B. 8, p. 402, &c., entered Dec. 9, 1873.
Exhibit A to my deposition.

E. B. McHENRY.

Ex. B.

* * * * * * * *

The receiver is authorized and empowered to follow up all non-resident stockholders, and to bring all necessary suits and pursue all proper remedies against delinquent stockholders, and, as
217 Ben. May, the *receiver* heretofore appointed receiver, has removed from the State, E. B. McHenry is hereby appointed receiver to take charge of any assets of the bank which may remain and manage & collect them for the benefit of the creditors and stockholders, and also to collect all unpaid decrees heretofore made. All decrees now or hereafter to be made against stockholders will be in favor of said E. B. McHenry as receiver. Instructions may be given the receiver from time to time.

* * * * * * * *

A true copy from minute book 17, page 335, &c.
Exhibit B to my deposition.

E. B. McHENRY.

Deposition of Ben. May. Filed Febr'y 21, '81.

218 By compl'ts—by consent:

1. Where do you reside and what is your occupation?

Ans. I reside in St. Louis, Mo., & am engaged in the business of life insurance.

2. Please state whether or not you are the same Ben. May who is mentioned and secured as an endorser for D. H. Townsend in a trust deed made by said Townsend to G. W. Winchester, trustee, dated June 18, 1875, and registered in Shelby county, Tennessee, and being the same trust deed that is involved in this suit.

Ans. I am the same Ben. May.

3. In said trust deed you are described and secured as D. H. Townsend's endorser of the following notes, viz:

219

1 due Hernando Ins. Co.,	June 16, '75,	for	------	1,153	71
1 " 4th Nat'l Bank,	" 29,	"	------	125	00
1 due Hernando Ins. Co. on	8th July,	"	------	1,500	00
1 " Taylor, Joy & Co.	" 10 "	"	------	284	00
1 " Hernando Ins. Co.	" 21 "	"	------	2,500	00
1 " Peter Tuggle	" June 28,	"	------	700	00
1 " S. M. Jobe	" July 30,	"	------	150	00
1 " Planters' Ins. Co.	" Aug. 4,	"	------	1,250	00

The trust deed also recites that Townsend is indebted to you in the further sum of $526.41 by notes held by him due on 4th November, 1874, being a note taken up by him (you) as endorser. It also recites that you are "also bound as endorser for me (Townsend) on a note held by Judge Ellett due July 15, 1875, in the sum of $1,000. Will you please now state which (if any) of said notes you have paid off or otherwise arranged (& how) as the accommodation endorser of D. H. Townsend. State also whether the note for $526.41, mentioned as having been taken up by you as Townsend's endorser, has been paid by Townsend or whether that indebtedness is still subsisting and due.

Ans. The note for $526.41 has not been taken up nor paid by Mr. Townsend, and is still due me on all the notes held by Hernando Ins. [Co.]. I waived demand and notice—the note, $125, held by 4th Nat'l Bank. My best recollection is that I paid it, and that afterwards embraced the am't in another and larger am't for int., &c., & other payments made by me for Mr. Townsend, which was discounted and afterwards paid by me. The Phillip Tuggle note, $700, was taken up at maturity with proc. of another note endorsed by me and the old note given to me, which I yet hold. The renewal note was endorsed and renewed from time to time until it was all paid by me. The S. M. Jobe note was disposed of as the Tuggle note by renewal and ultimately paid by me. I hold the original yet unpaid by Mr. Townsend. The Planters' Ins. Co. note was renewed from time to time, but never paid by me, though I paid the interest on some of the renewals. The Judge Ellett note I took up with proc. of another note and held the original note. In floating it I borrowed from S. M. Jobe on D. H. Townsend's note about $500, and gave him, Jobe, the original, which is held by the est. of S. M. Jobe. I took Jobe's rec'pt, which I have mislaid, for the note as collateral for the am't—I think $500—borrowed on Townsend's note with my endorsement. The Taylor, Joy & Co. note I think was renewed in part; my impression is I paid a part of it.

4. Please state whether or not your liability as endorser of the other notes mentioned in the trust deed has been legally fixed by due demand and notice, and whether or not you deny or contest your liability on either of them, and whether or not your desire and purpose is to have the property conveyed in the said trust deed devoted to the payment of the indebtedness mentioned therein.

Ans. My liability was fixed by waiver on demand and notice on all of the paper or renewal as in the case of Planters' Ins. Co.'s paper, original for awhile after renewal, but, being told by Mr. Townsend that it was otherwise secured, I either gave it up or mislaid it, is my best recollection. I looked after the paper, admitted my liability all the while, and bought the property at public bankrupt sale, borrowing the money from Hernando Ins. Co. to pay for it, subject to the trust deed—my purpose being to discharge the indebtedness for which I was liable as far as possible.

Cross-examined by def'ts:

X 1. If, in answer to Ques. 3, of examination-in-chief, you say you have paid off any of said notes, state when they were paid and explain fully the manner of payment; if you say any of such
224 notes were otherwise arranged, state fully and minutely the manner of said arrangement and exhibit any evidence of payment or arrangement that you have, and state whether there is any such evidence in existence and its nature.

Ans. I have stated in answer to 3d direct the am'ts paid as nearly as I can, and, as to dates, some of the paper renewed was floated for some time after the maturity of the original. I remember that Judge Ellett held the original note as collateral until the debt was discharged, as to him. A part of the money to pay Judge Ellett was borrowed from S. M. Jobe on Mr. Townsend's note, by me endorsed, and I turned the original over to Jobe as further security. The
225 Tuggle note I file herewith as Ex. A. I do not remember the dates & am'ts of the several notes used in floating it until the whole am't was more than paid, including high rates of interest. I file the note, $526.41, as Ex. B. The Jobe, $150, I do not find among the papers I brought with me from Memphis. I have no memorandum with me covering the renewals & int., but I kept one at Memphis; hence I answer according to my best recollection.

X 2. Have you any property in Tennessee which can be subjected to the payment of any of these claims against Townsend for which you are endorser.

Ans. In its present condition I think not.

BEN. MAY.

Sworn to & subscribed before me the 19th Febr'y, 1881.

[SEAL.] MILLARD F. WATH,
Notary Public, City of St. Louis, Mo.

226 Ex. A.

$700. MEMPHIS, TENN., *May* 26, 1875.

Thirty days after date I promise to pay to the order of Ben. May, in Memphis, Tenn., seven hundred dollars for value received, having deposited as collateral security certificate No. 4380, for 23 shares of the capital stock of the Southern Life Insurance Company, each share one hundred dollars, and in case this note shall not be paid when due I hereby give the said owner of this note, P. Tuggle, authority to sell the said collaterals, or any part thereof, for my account on the maturity of this note or at any time thereafter at public or private sale, at his discretion, without advertising the same or giving me any notice, and to apply so much of the proceeds
227 of said collaterals to the payment of this note as may be necessary to pay the same, with all interest due thereon, and also to the payment of all expenses attending the sale of said collaterals, and in case the proceeds shall not cover the principal and 10 per cent. interest, after maturity and expenses, I hold myself bound to pay the balance. D. H. TOWNSEND.

Endorsed: Ben. May. Phillip Tuggles.

Ex. B.

$526.41. MEMPHIS, *Sept.* 2*d*, 1874.

Sixty days after date I promise to pay to the order of Ben. May five hundred & twenty-six $\frac{41}{100}$ dollars, payable at State Nat'l Bank, with int. at 10 %, after maturity, value received.

D. H. TOWNSEND.

Endorsed: Ben. May.

Deposition of S. H. Dunscomb. Filed Feb. 24, '81.

228 Compl'ts:

1. What is now and has been for ten years past your occupation, and how have you been connected with the Hernando Ins. Co.?

Ans. I have been president of the Hernando Insurance Company for the past ten years.

2. Please state whether since you were first informed of the reference to the clerk & master of the chancery court of Memphis, in the case of Jones *v.* Townsend, to fix and report the fee of Messrs. Heiskell, Scott & Heiskell you have had any interviews with Judge C. W. Heiskell or with Mr. T. H. Heiskell in reference to the interests of the Hernando Ins. Co. in the land involved in that suit and in reference to the position that the Hernando Ins. Co.
229 would take and maintain about said land and their fee; if so, please state about how many interviews you had with either of them, and as near as you can about what time, and especially how long after you first knew of the reference to the master as aforesaid.

Ans. I have no remembrance of ever having any interview with Mr. F. H. Heiskell in regard to this matter, but I have had four or five or more interviews with Judge C. W. Heiskell on the subject, and in my interviews with him I always took the position that their fee was an enormous one, and that we would contest it. The first interview with him was had very soon after the reference to the clerk & master was made, and prior to the sale of the land.

230 3. Please state substantially what position you assumed in these interviews for the Hernando Ins. Co. in reference to the lien of Messrs Heiskell, Scott & Heiskell; what about a redemption of the property, and what about contesting their lien on the property in the event the property was not redeemed and no compromise was made.

Ans. My position is that they had no lien on the property, but I was willing to make a reasonable compromise with them as regards a redemption. I was in doubt, for I did not feel like advancing so large an amount of money when there were so many interests, but I never said anything to him that would lead him to believe that I intended to abandon the matter.

231 4. State whether or not you, in either of these interviews, gave either gentlemen to understand that you or your company abandoned, or would not insist upon any legal right it had, or after their fee was reported that you would not contest their lien—

state whether you can recall anything you may have said that was calculated to impress either of these gentlemen with the idea that you would not contest their lien after their fee was reported.

Ans. In all my interviews with him I never said anything that would lead him to infer that I intended to abandon any legal claim the Hernando Ins. Co. might have, but, on other hand, I always
232 intended to insist on any legal claim the company might have. I cannot recall any expression that would in any way lead to the belief that I had any intention to abandon the matter In one of our first interviews Judge C. W. Heiskell stated that he wanted it understood that anything that passed between us should not have any weight in case of litigation.

Cross-examination:

X Q. Is it not so that the only interview you ever had about the the case with C. W. Heiskell, before we all returned from the yellow fever in 1879, was the one in which you referred C. W. Heiskell to Mr. Estes, the company's lawyer, and with this exception is it
233 not true that the only communication you and C. W. Heiskell had on the subject *was* the letters passing between you and him when you were in Va. and he was at Rogersville, Tenn., up to the time we returned?

Ans. As stated above I had four or five or more interviews with Judge C. W. Heiskell on the subject in addition to the correspondence referred to.

S. H. DUNSCOMB.

Sworn to & sub. before me Feb. 24, '81.

R. J. BLACK, *C. & M.*

Deposition of T. P. Winchester. Filed Feb. 25, '81.

By compl'ts, upon int.—by consent:

1. Where do you reside, what is your profession, and in what manner are you connected with this suit?

234 Ans. I reside at Fort Smith, Ark.; I am a lawyer; I am complainant in this suit, as trustee, by appointment of the chancery court of Shelby county, Tenn., in a certain conveyance made by D. H. Townsend to secure certain creditors.

2. Please state when your father, G. W. Winchester, died, and when you were appointed his successor in the trust deed from D. H. Townsend, to him referred to and involved in this suit.

Ans. My father, Geo. W. Winchester, died on the 31st day of Dec., 1878. I was appointed his successor on the — day of ——, 187–; the date I do not remember, but the record can be seen in this court.

3. Please state whether or not, as trustee, you have sold any
235 of the property embraced in the Townsend trust deed; if yea, when, what property, and state the nett amount of the proceeds of said sale.

Ans. I sold, as trustee, two pieces of property named and de-

scribed in said deed, to wit, an undivided ¼ interest in a lot corner Beal and Main Sts., Memphis, Tenn., & 100 acres in the 13th civil dist., Shelby county, Tenn.; the net amount of sales was $2,429.15. I think the sale took place on 13th Jan'y, 1880.

4. Please state whether or not in advertising and selling said property you conformed strictly to the requirements and provisions of the trust deed, and whether the property sold realized as much as you could get for it at public auction on the terms prescribed by the trust deed.

236 Ans. I endeavored to conform strictly to the requirements and provisions of the deed of trust and believe that I did. I had a good attendance at the sale and I think the property was well sold. I offered it as long as I could get a better bid and finally sold it to the highest bidder.

5. State whether or not, at the time of the reference to the master to report the fee of Messrs. Heiskell, Scott & Heiskell in the Jones & Townsend case, and at the time of the decree confirming said report and the sale of the property in that case, you were trustee under the Townsend trust deed or whether your appointment as trustee was subsequent thereto.

237 Ans. I was not trustee at that time, but was assignee in bankruptcy of D. H. Townsend. My appointment as trustee was subsequent.

6. Please state whether or not, during the pendency of the reference to the master to report fee of Mess. Heiskell & Scott and Heiskell in the case of Jones *v.* Townsend, or shortly thereafter, you conversed with Mr. F. H. Heiskell or Judge Heiskell in reference to the result of the investigation by Mr. B. M. Estes of the record in that case for the Hernando Insurance Co., and whether or not you mentioned to them or either of them the fact that Mr. Estes did not think that Heiskell, Scott & Heiskell had a lien on the property involved in that suit for their fee.

238 Ans. In answering this question I must beg some latitude. After the case of Jones *v.* Townsend was sent back by [the] upreme court for reference as to fees of Messr-. Heiskell, S. & H., I examined the matter more closely than I had done before and became satisfied there was nothing in the place for the bankrupt's estate and so determined to give it up, but before doing so I spoke to Mr. Dunscombe, representing the Hernando Ins. Co., and & he referred me to the att'y of the Co., Mr. Estes. He gave me no satisfaction for awhile, but just before the master reported Mr. Estes told me he had decided not to appear for the company, as he was satisfied Mess. Heiskell, Scott & H. had no lien for their fees, and he did not intend the Ins. Co. should be bound by those

239 proceedings. I gave the case no further attention, and the report of the master was confirmed, and a sale ordered to satisfy the fee allowed by him. As I have stated before, during all this time I saw Mr. F. H. Heiskell frequently and talked freely with him about the matter. I told him I was expecting assistance from Mr. Estes, and then told him that Mr. Estes had decided not to appear, and that as far as I was concerned he might go ahead. I

think it was either at this time or between this time and the sale which took place shortly afterwards that I told Mr. F. H. Heiskell that Mr. Estes did not believe H., S. & H. had a lien for their fees, and hence he would not make the fight. I know the an-
240 nouncement produced some merriment in which I joined, because I thought they had a lien and because I felt that I had been left with the bag to hold in a contest in which I had no interest.

7. If you are in doubt about the exact time when you mentioned this fact to either of the gentlemen will you please state your best recollection as to the time when you first mentioned it to either of them?

Ans. I cannot state positively when I mentioned this matter, but I think it was at the time named in the last answer.

8. If you should now be told that these gentlemen did not
241 know or were not informed that Mr. Estes entertained doubts about the validity of this lien until a long time after the reference to the master in Jones *v.* Townsend, would it surprise you or not? And if it would please state why.

(Excepted to.)

Ans. I should be surprised at such a statement, because I think I talked with them before the sale to satisfy their lien about this very thing.

Cross-examined:

Have you not, since giving your former deposition in this cause, expressed an inability to recollect whether you mentioned to any of the defendants or F. H. Heiskell the reason Mr. Estes gave you for not participating in the reference.

Ans. In a letter to F. H. Heiskell of date Dec. 15, '81, I
242 say whether or not I then stated why he refused. I cannot now remember.

T. P. WINCHESTER.

Subscribed and sworn to before me this the 22 day Feb'y, 1881.
MATHEW GREY, *J. P.*

Deposition of B. M. Estes. Filed June 15, '81.

It seems to be proper that I should state my recollection of the facts of this case so far as I have been connected with them. Early in the year 1877, and pending the reference to the master in the case of Jones *v.* Townsend under the decree of the chancery court at Memphis, to report the fees of Mess. Heiskell, Scott & Heiskell, I was requested by Mr. Dunscomb, president of the Hernando Insurance Company, to look into the case, investigate the record, and advise
243 the company what steps it ought to take in the case, which I agreed to do. At the threshold of my investigation I ascertained that the case was before the master on the order of reference; that a number of depositions was already taken, and that Mr. F. H. Heiskell was attending to the case for Messr-. Heiskell, Scott & Heis-

kell, while T. P. Winchester, Esqr., was giving it attention for the bankrupt estate of D. H. Townsend. I requested Mr. F. H. Heiskell not to close the reference until I had time to look into the record and determine what course I would advise the Hernando Insurance Co. to take in the matter, which he kindly consented to do. My recollection is that some days elapsed before I could examine the
244 papers and prepare myself to advise the Co., and that Mr. Heiskell became somewhat impatient and spoke to me more than once about the matter before I was prepared to give a definite answer. Finally he (and no doubt Judge Heiskell, as he says) spoke to me on the subject, and I told them to go ahead, I would not make the Hernando Insurance Company a party to the suit, or I would not delay them any longer, or something to that effect. I cannot pretend to give the exact language of any conversation that occurred so long ago, and my memory of the details of a transaction of the past is not good, but I generally remember the leading or important facts pretty well. When I looked into the papers in the case I concluded that in the case as it stood it would be difficult to reduce the
245 amount of the fee already fixed by depositions, and I thought the trustee and creditors under the Townsend trust deed would not perhaps be concluded by the decree in the case, and that it would likely be best for the Co. not to become a party to the suit. I also thought that Mess. Heiskell, Scott & Heiskell were not strictly in law entitled to a lien on the property. There was several circumstances to embarrass in the matter. In the first place, my relations with Mess. Heiskell, Scott & Heiskell were quite cordial and friendly, and I hoped that some compromise or settlement would be effected which would render it unnecessary for me to discharge the unpleasant duty of contesting their fee. In the second place, I represented at the time no creditor under the Townsend trust
246 deed but the Hernando Insurance Company; and in my opinion that if that company, by advancing money on the purchase or otherwise, should secure any benefits to itself, the other creditors would share in such benefits without contributing to the cost of them. In the third place, it was difficult to determine whether the value of the land would exceed the amount of the decree sufficiently to justify the advance of so large sum of money by the insurance company. I was beset with these and other perplexities all the way through the matter. On the whole, I thought, and Mr. Dunscomb did also, that there would be likely nothing to gain by voluntarily entering an appearance in the Jones and Townsend case, and that perhaps
247 if it did not some satisfactory adjustment could be made, and, failing in that, that the contest (if on further investigation it was thought the contest could be successfully made) might be made in the future. While I do not remember distinctly I had the impression that I told Mr. Heiskell, or, perhaps, Judge Heiskell, that I looked into the papers in Jones *v.* Townsend to determine not only whether it would be best for the Hernando Insurance Company to become a party to that record, but also to determine whether it or the trustee and creditors under the Townsend trust deed were con-

cluded by that record. I also thought that I told them, or one of them, of my doubts on the point whether Heiskell, Scott &
248 Heiskell had a lien. I had the impressing that I had mentioned these things to one or both of them, because of our kindly relations to each other, and because I know I had no motive or desire to conceal them from them or to mislead them. After the property was sold subject to redemption the course to be persued by the Hernando Ins. Co. was still in doubt, and remained in doubt until the time for redemption had expired. I was anxious all the while to settle the matter in some way and to avoid this litigation, and did what I could to favor a redemption if it could be done with any prospect of advantage to the Co., and if no adjustment could be made by compromise or otherwise. The difficulties about redeeming the property were: 1st. The doubts whether more than
249 the redemption money could be realized out of the land, and, secondly, whether if the Hernando Insurance Company advanced the money the other creditors would not share the benefits. My recollection is that, pending my investigation preparatory to giving my advice to the insurance company, I had several interviews with Mr. F. H. Heiskell, and, perhaps, with Judge Heiskell, and if finally I used the language "Go ahead" without more it was under the impression that I had told them or they knew that I was investigating the record to determine the legal questions that were naturally involved in the consideration of the point whether the insurance company should voluntarily enter an appear-
250 ance in the case. Besides, inasmuch as I had requested Mr. Heiskell not to close the reference until I had examined the case, it is quite likely that I finally told him to go ahead or that the Co. would not enter an appearance, or something to that effect. I have no recollection of being present at the sale.

B. M. ESTES.

Sworn to and subscribed before me June 15, '81.

R. J. BLACK, *C. & M.*

Deposition of W. W. Coleman.

By def'ts:

1. Where do you reside; what is & for several years has been your occupation?

Ans. I reside in the city of Memphis; have been a deputy sheriff for the last ten years.

251 2. Are you acquainted with Ben. May and W. S. Staley, who are parties, compl'ts, & witnesses in this cause? If so, state whether or not you know the present residence of each and whether or not said Ben. May and W. S. Staley are now solvent or insolvent, if you know their financial condition.

Ans. I know both of them very well; neither of them now live here; Ben. May is a resident — St. Louis; I don't know where Staley lives; both May & Staley are insolvent and notoriously executions proof even as against a little cost bill.

Cross-examination:

X 1. About how many years since May and Staley removed from Memphis? State as to each separately.

Ans. May about four years & Staley longer; I don't recollect.

252 X 2. Do you pretend to know how much property Ben. May owns in St. Louis or in the State of Missouri, where he resides, or how much property Staley owns in the State of Virginia, where he resides?

Ans. I do not.

And further deponent saith not.

W. W. COLEMAN.

Sworn to & subscribed before me June 15, '81.

J. S. GALLOWAY, *J. P.*

Agreement of Counsel. Filed June 15, '81.

In this cause it is agreed that D. H. Townsend, the maker of the deed of trust set up in the bill of compl'ts and client of resp'ts in the litigation between Annie L. Jones & others & said Townsend, filed his petition in bankruptcy on the 30th day of Mar.,
253 1875; that T. P. Winchester, party compl't and witness herein, was appointed or elected his assignee in bankruptcy on the 12th day of Jan'y, 1876; that all of the assets of said Townsend were conveyed to said assignee by deed in the ordinary form of such conveyances on the 17th day of Feb'y, 1876, and that none of this tract of 640 acres involved herein was among the property set apart to said bankrupt as exempt under the bankrupt law; that on the 13th day of December, 1875, said Townsend was declared a bankrupt, and on the 14th day of March, 1881, received his discharge; that his assignee has paid to the creditors of said bankrupt out of his estate 21¼ % on their claims proven, said claims
254 aggregating $26,012.58; that on the 27th day of Feb'y, 1879, said T. P. Winchester, as assignee in bankruptcy of D. H. Townsend, sold at public sale the right of redemption in and to said 640-acre tract, and that the Hernando Ins. Co. became the purchaser of said equity of redemption, and that the paper attached hereto marked Exhibit "A" is a true copy of the deed made by said Winchester to the H. Ins. Co. in pursuance of said sale, and that said exhibit may be read as evidence on the hearing, subject to exception for competency. It is also agreed that T. P. Winchester, assignee in bankruptcy of D. H. Townsend, took possession of this property and rented it for the years 1876 & 1877, and that the tenant was in possession in 1877, when resp'ts took possession of the land;
255 that, further than as shown in this agreement and the proof in the cause, the assignee and creditors of said Townsend have set up no claim to this property. It is further agreed that the papers in the cases of Jones *v.* Townsend and of Ben. May *et al. v.* T. P. Winchester, No. 3225, R. D., may be considered as in evidence and may

be referred to by either on the hearing so far as they may be competent or relevant.

ESTES & ELLETT, *For Compl'ts.*
W. Y. C. HUMES & HENRY CRAFT,
For Resp'ts.

EXHIBIT A.

Copy from Book 129, *p.* 412.

STATE OF TENNESSEE, *Shelby County:*

At a sale made by me as assignee of D. H. Townsend, bank-
256 rupt, in front of the Planters' Ins. Co. building, No. 39 Madison St., Memphis, Tenn., after one advertisement in the Memphis Appeal, The Hernando Insurance Co. of Memphis, Tenn., became the purchaser of my equity of redemption in the following-described real estate, to wit: Situate, lying, and being in the county of Shelby & State of Tenn., in district No. 13, beginning at the N. E. corner of a 2,250-acre tract known heretofore as the Weaver & Turner tract, running thence south, crossing Nonconnah creek, in all 61 chains & 87 links, to a stake; the N. E. corner of the S. E. division of said 2,250-acre tract; thence west with the north line of said S. E. division 106 chains & one link to the central corner of all of said divisions; thence west with the north line
257 of Weaver's 513-acre tract 60 chains & 37 links to a stake on the north line of said 2,250-acre tract; thence east 57 chains & 51 links to a stake near the bank of Nonconnah creek; thence north 78° east 9 ch. 80 l., crossing said creek to an elm on the east bank of said creek; thence 30 chains 90 links to the beginning, containing 630 acres more or less. Now, therefore, in consideration of the payment to me of its bid, to wit, thirty dollars ($30.00), the receipt whereof I hereby acknowledge, I hereby release, remise, convey, and forever quit-claim to the said Hernando Ins. Co. of Memphis, Tenn., all right, title, and interest which I have as assignee aforesaid in and to my said equity of redemption in the land
258 described, title to which was vested in me by the supreme court of Tennessee, at Jackson, on the — day of ——, 1877, in the case of Annie Jones & *al. v.* D. H. Townsend.

T. P. WINCHCHESTER, *Assignee.*

Attest:
D. M. SCALES.
JUNIUS R. GREEN.

Acknowledged March 5, 1879, noted for registration Jan'y 15, '80, and recorded next day.

In re D. H. TOWNSEND, Bankrupt.

No. 1386. In Bankruptcy.

To the Hon. Connelly F. Trigg, judge:

Your petitioner would respectfully show to your hon. that, on the — day of ——, 187–, he was appointed assignee of D. H. Townsend, who

had been adjudicated a bankrupt; that among the other property consigned to your petitioner by deed of the register, of date — day of ——, 187–, was a tract of land in the 13th civil district of Shelby county, Tennessee, containing 640 acres; that this land was in litigation at the time of said conveyance in the suit of A. L. Jones *et al. v.* D. H. Townsend, then pending in the supreme court of Tennessee; that your petitioner rented this tract of land to D. H. Townsend for the year 1876 and again for the year 1877, taking his note for the current year due November 1st, 1877; that some time early [in] the year, about first January, 1877, the supreme court decided that Mr. Townsend was entitled to land, and vested the title in me, his assignee, by decree, in the same decree declaring a lien on the land for the fee of Mess. Heiskell, Scott & Heiskell, Mr. Townsend's attorneys in the case, and remanding the case to the chancery court of this county for further orders; that Messrs. Heiskell, Scott & Heiskell had a reference to the clerk & master to take proof and report what would be a reasonable fee for their services in the case, and upon the report coming in, allowing them $5,500.00, they took an order of sale, and at the sale became the purchasers of the land; that said sale to them was confirmed on the 27th day of Oct., 1877; that immediately they set up a claim to the rent of the land for the year 1877, for which your petitioner had taken Mr. Townsend's note for $500.00, due on the 1st day of November, 1877, claiming that, as the rent was not due until after their purchase, they were entitled to it; that your petitioner thinks he is entitled to it, or at least to such a part of it as had accrued at the time of their purchase, to wit, on the 27th day of Oct., 1877. Your petitioner therefore prays your hon. to make Mess. Heiskell, Scott & Heiskell, a firm, composed of J. B. and Carrick Heiskell, residents of Shelby county, Tenn., and W. L. Scott, a resident of St. Louis, Missouri, parties defendant to this petition; that a day be fixed for its hearing, and that they be notified to be present and show cause, if any they have, why your petitioner should not have the rent for 1877 of the land aforesaid, which rent, amounting to $500.00, is, by agreement of the parties, deposited with J. B. & Carrick Heiskell to the order of your hon. Petitioner prays for instructions in this behalf and for such other relief as the merits of the case may require, & as in duty bound will ever pray.

T. P. WINCHESTER,
Assignee in Bankruptcy of D. H. Townsend, Bankrupt.

Personally appeared before me, H. E. Andrews, clerk of the U. S. district court for the western district of Tennessee, T. P. Winchester, who made oath that the allegations made in this petition of his own knowledge are true, and those stated on information he believes to be true.

H. E. ANDREWS, *Clerk.*

Endorsed: No. 899. District court of the United States, western district of Tennessee. Petition of T. P. Winchester, assignee, *v.* Heiskell, Scott & Heiskell. Filed Dec. 17, 1877. H. E. Andrews, clerk, by L. H. Pillsberry, D. C.

I, Horace E. Andrews, clerk of the U. S. dist. court for the western district of Tennessee, do hereby certify that the foregoing is a true and complete copy of the original petition as the same appears of record and on the files in said court.

Witness my signature and seal of said court this 28 day of Dec., 1877.

H. E. ANDREWS, *Clerk*,
By L. H. PILLSBERRY, *D. C.*

Record in the Case of Jones v. Townsend Since Filing of Procedendo.

Order reference. Ent. Dec. 19, 1876. M. B. 16, p. 372.

ANNIE L. JONES & Others *v.* D. H. TOWNSEND *et al.*

264 This cause coming on for further orders is referred to the C. & M. to take proof and report as to the amount of the fee that should be allowed Mess. Heiskell, Scott & Heiskell as attorneys for defendant in this cause in the chancery & supreme courts. The clerk will report to this term if possible; if not, to the next term of this court.

Depositions of Stephenson, Kelly, & Levi. Filed Dec. 23, 1876.

Witnesses for def't.
By agreement.

T. C. STEPHENSON:

1. State your age and occupation and where you live, and if you know the parties to this suit and the land in question.

Ans. I am fifty years of age; I am a farmer; I live in the 13th civil district of Shelby county, Tenn., joining the land in
265 controversy, and I know the land in controversy.

2. Please state the value of the land at this time, or as near as you can.

Ans. The land is worth twenty dollars ($20.00) per acre to-day.

3. How long have you been living near this land; how long have you known it?

Ans. I have known the land since 1850 and I have been living near it since 1857.

Cross-examined:

X 1. Do you own or rent the land on which you live and what land is it?

Ans. I live with my son-in-law on land adjoining this land. I own no land adjoining, but do own land—160 acres—two
266 miles south of this.

X 2. What would you take for the land you own per acre?

Ans. I would take thirty dollars per acre ($30.00 per acre).

Re-examined:

1. Has there been any sale of land in the vicinity of the Jones land recently?

Ans. William Peebles has bought of Dr. Bynum within two months. I understand he paid $25.00 per acre. I understand this land is taken in payment of a debt. This land is immediately south and joining this tract.

(Excepted to by F. H. Heiskell as incompetent and irrelevant and as hearsay.)

2. Is there any land for sale in that vicinity?

267 Ans. Yes, sir.

3. What is it held at?

Ans. Land just beyond it we—Col. McKisick & Judge Wright, & I as agent for them—have been offering part of the same tract in southwest corner at $20.00 per acre, and we can't sell it at that figure. I mean part of the same Dan'l B. Turner 2,200 tract, of which the Jones tract in controversy is a part.

Re-examined by counsel for H., S. & H.:

1. Does not the Jones 640-acres tract lie fronting on the Horn Lake road, and is not the land referred to in your last answer about a mile from said road at its nearest point?

Ans. Yes, sir; the land referred to lies about a mile from

268 the Horn Lake road across Cypress creek. The Jones land fronts on the Horn Lake road.

2. What do you consider the relative value of the two tracts—the Jones land and that which you as agent offered for $20.00 per acre?

A. I consider the Jones tract worth twice as much as the other. I mean by Jones land the land in controversy in this case.

3. Has the land mentioned as bought by Peebles any improvements on it? How much is there of it and what is its relative value as compared with the land involved in this suit?

Ans. It has no improvement on it that I know of—probably has a little cleared land on it; contains, I think, about 140 or

269 180 acres. It fronts directly on the Horn Lake road. I consider it of about equal value with the Jones land per acre taking the whole tract together.

F. C. STEPHENSON.

J. C. KELLY:

1. State your age, occupation, your place of abode, if you know the land in controversy, and what it is worth now, as near as you can.

Ans. I was 51 years old the 14th of last Sept.; I am trying to farm; I live 5 miles south of Memphis on the Horn Lake road, on the Townsend place, known as the Jones place, the land in controversy; I have lived there seven years, and I would say the land was worth twenty dollars per acre now.

Cross-examined:

270 X 1. If you owned the land above referred to and wanted to farm or try to farm in that section of country, what would you take for it?

Ans. I cannot say.

X 2. What percentage on the value of land received as rent would you consider as rendering the land a good investment?

Ans. I would consider 10% of cost yearly rent as rendering the land a good investment, provided it was so situated as not to wash.

X 3. How much can the land in controversy be rented for?

Ans. I should say about six hundred dollars.

X 4. How much cleared land is there on this tract?

271 Ans. About one hundred and forty acres.

5 X. Is not your estimate of the rental value based upon the amount of cleared land entirely?

Ans. It is.

J. C. KELLY.

Sub. & sworn to before me Dec. 23, '76.

E. B. McHENRY,
D. C. & M.

J. W. LEVY:

1. State your age, occupation, place of residence, if you know the land in controversy, and it is what worth now.

Ans. I am 45 years of age; by occupation a farmer; I live on the Horn Lake road, 8 miles from Memphis; I know the land in controversy; I think it is worth $25.00 per acre.

272 2. What is land in that section taxed at, if you know?

Ans. Mine is assessed at 20 dollars; it is 3 miles below this.

Cross-examined:

1 X. How much would you take for your land?

Ans. I wouldn't take less than 40 dollars per acre, but I don't want to sell.

2 X. To a man who wants to hold land in that section for the purpose of farming, how much is the Jones land worth?

Ans. It is worth twenty-five dollars per acre.

3 X. How much can you rent land for where you live?

273 Ans. About 150 or 175 pounds of seed cotton per acre.

J. W. LEVI.

Subscribed and sworn to before me Dec. 23, 1876.

E. A. COLE, *C. & M.*

Order Reference. Ent. Jan. 6, '79, *M. B.* 16, *p.* 442.

ANNIE L. JONES & *al. v.* D. H. TOWNSEND.

In this cause, it appearing that it has been remanded to this court from the supreme court in order that the fund in court herein may be disposed of by proper orders, on motion of counsel a reference is ordered to the clerk and master to report to the court from proof already on file and the present record of the cause or from any other

proof that may be offered—1st, the amount of the fund in
274 this cause that was loaned out; 2d, who furnished the money that was paid into court in this cause; 3d, what disposition was made of said money, to whom it was loaned, and when and for what time and on what terms and security. He will make this report at as early a day of the present term as practicable.

Dep. of W. A. Wheatley. Filed Jan. 6, '77. On Ref. as to Fees.

1. What is your age, business, and place of residence?

Ans. Thirty-four years of age; I reside in Memphis, and am engaged in the real estate business.

2. How long have you been doing business a[s] a real
275 estate agent in Memphis?

Ans. About nine years.

3. Are you familiar with the tract of land involved in the above case; and, if so, what do you consider a fair valuation for the same?

Ans. I know the land in question, and consider it worth at the present time about sixty dollars per acre, where it is not overflowed. I should say about one-third of it was affected by water, but do not know certainly how this is.

4. How much do you consider the overflowed portion worth?

Ans. About forty dollars per acre.

276 5. How much was the same land worth in 1871 and in 1869, 1870?

Ans. I would consider that it was worth about ten dollars per acre more than at present.

Cross-examined:

1 X. Do you own any land in the neighborhood of the land in controversy?

Ans. I own some about 2½ miles southwest of it.

2 X. Have you sold any land in that neighborhood recently?

Ans. No, sir; I have not.

3 X. Do you know of any sale made in that vicinity recently?

Ans. I know of [a] sale made a few years ago of land 2 miles south of that to F. C. Stephenson at $40 per acre. I did not sell it myself, but that is my information. This sale was made
277 about four years ago. The value of this land is the sale of the wood. It is only 5½ miles from Memphis and about ½ miles *from* one mile from the Miss. & Tenn. R. R.

4 X. Do you know how much of the land is cleared?

Ans. I do not. I have never had any occasion to know anything about it except from passing.

5 X. What can the land be sold for now for cash?

Ans. I don't know. I have not had any for sale out there. Cash sales are hard to make; the farmers have no money.

6 X. How do you arrive at your valuation of this tract?

278 Ans. From the great fertility of the soil, the demand for the wood, and its easy accessibility to the market of Memphis, both by rail and public highway, and by the assessments for taxes at the dates mentioned in the question.

7 X. Is the land in question valuable for anything else than a farm for planting, &c.?

Ans. I don't think it is; it is too far for residences.

8 X. How much cotton will it produce to the acre, and how much corn?

Ans. I should think it would make ¾ of a bale to the acre; more corn than ordinary hill farms and nearly as much as bottom farms.

9 X. Are you a farmer?

279 Ans. No, sir.

10 X. How long has this place been in cultivation?

Ans. I expect about 6 years. I have known it about that long. It is evidently new, from the trees still in the field.

11 X. Has there been any reduction in the value of real estate in the past four years?

Ans. There has been, I think, about 20%—about ⅕.

12 X. Is there any sale of real estate at this time here?

Ans. Yes, sir; some. I sold 12½ acres of cleared thin land near Goodlett's station, on M. & C. R. R., at $25 per acre cash. He bought it for residence & farm. The same purchaser bought 16 acres

280 joining this at same price. I also sold 3 acres of same tract, about ½ mile north of Goodlett's station, for $35 cash. This tract is about ½ mile from the turnpike on the State Line road, and is the Dunn subdivision.

And further this deponent saith not.

W. A. WHEATLEY.

Sub. & sworn to before me Jan'y 6, 1877.

E. B. McHENRY,
D. C. & M.

281 *Dep. of D. H. Poston. Filed Jan'y* 13, '77.

On question fees:

1. Are you familiar with the litigation in this case, the land involved, &c.; and, if so, what do you consider reasonable compensation due Messrs. Heiskell, Scott, and Heiskell for services as attorneys in said case in chancery and supreme courts?

Ans. I am somewhat familiar with the record in this cause, having heard it argued in [the] chancery and supreme courts and having given my deposition in the cause. The extent of the labor done in the case I do not know, and the record is not before me. The

282 questions in the case were mostly questions of law, and the case was vigorously contested in both courts. The counsel for the Jones estate made vigorous arguments, and the case was mainly decided and went off on the effect of execution sales and the laws of redemption. I myself represented Mr. Townsend, and made the levy of the execution upon the property, and caused the sale to be made by the sheriff. The debt was insignificant upon which the sale was made, as compared with the value of the property, the debt being about $1,100. The property sold was worth at least $50,000, and would now, by proper management, realize

283 from $35,000 to $45,000. The fee in the case, in my opinion, should not be less than from $5,000 to $6,000, as the property involved would justify such a fee, especially as the case went to the supreme court, and was strongly contested by able counsel.

Cross-examination by T. P. WINCHESTER for def't:

X 1. What is a reasonable fee for the services in this case in the chancery court?

Ans. I think that the fee should be about ⅔ for the services below & ⅓ for the supreme court.

X 2. How do you estimate the value of the land—what is your basis? How much of the land is cleared, and what is the
284 difference in value between the cleared and the timbered land?

Ans. I have not been upon the land since 1865 or 1866; it was then heavily timbered; it was then worth $100 per acre; the timber then would have realized nearly that amount per acre; the land was about one-fourth or fifth cleared, as I remember it, the large portion of which was fine land; the cleared land was the least valuable, in my opinion, as the timber at that time I was upon it *was upon* was very valuable, cord wood selling on the Penn & Mitchell lands contiguous to it *being worth* from 2½ to $5 per cord, which would render the timber more valuable than the land; don't
285 know what cord wood is worth now.

And further saith not.

D. H. POSTON.

Sworn to & subscribed before me Jan. 13, '77.

R. J. BLACK, *D. C. & M.*

Dep. of W. P. Mitchell. Filed Jan. 22, '77. Upon Ref. as to Fees.

1. Where do you reside and how long have you lived there?

Ans. I reside in Memphis; have lived there since the war; have resided in Shelby county about twenty-eight years.

2. Are you acquainted with the land in controversy in this case; and, if so, what do you consider it worth per acre?

286 Ans. I am familiar with the land in question, and think it worth fifty dollars per acre.

3. What was said land worth from 1869 to 1871?

Ans. About this time, I think, my brother sold land below this, which I do not consider so valuable as this land, for seventy & seventy-five dollars per acre. I think this land could have been sold for the same price at that time.

Cross-examined by counsel for assignee of Townsend:

1 X. Is any of this tract subject to overflow?

Ans. I don't know whether it is or not. I should not call this overflowed land. I don't think it is subject to anything
287 but sipe (Mr. Mitchell's spelling) water, & that is only when the water is at a very high stage.

2 X. How much of this tract is cleared?

Ans. I don't know; there has been a great deal of timber cut off; I know the Jones' were cutting and hauling timber a good while; I know there is considerable clearing about the house, but I don't know to what extent.

3 X. What makes the land valuable?

Ans. It is valuable for farming purposes and for the timber on it; it is about the nearest available timber in that direction
288 from the city; I don't know how the timber stands now, but it was the same character as all the timbered bottom land.

4 X. Do you own any land near to this tract; and, if so, how do you value it?

Ans. I own a small tract adjoining it, & I think it is worth $50.00 per acre.

4 X. Have you sold any land in the vicinity of the tract recently; and, if so, for how much & on what terms?

Ans. I have not, sir.

5 X. Have you any land in this vicinity for sale?

Ans. No, sir.

6 X. Did you not offer Banday, a dairyman, a certain tract
289 or parcel of land adjoining this or somewhere near it recently; and, if so, at what price?

Ans. This side of that just in the edge of — bottom I offered it to him at $50.00 per acre.

7 X. Can the land in question be sold now for fifty dollars per acre—the whole 640 acres?

Ans. I don't know, sir. This is my estimate of what it is worth.

8 X. Is it not a fact that there is now very little sale of real estate in this county?

Ans. Yes, sir.

9 X. If this tract of land were offered for cash to the highest bidder, would it bring $50.00 per acre?

290 Ans. I don't think it would. You can't sell large bodies of land like you can smaller tracts. I don't know anybody that's got the money to buy a large tract of land & pay all cash for it. I know I *I* would not take less than $50.00 per acre for my land joining this.

his
W. P. x MITCHELL.
mark.

Sworn to & sub. before me Jan. 22, '77 (witness making mark on ac. of broken arm).

R. J. BLACK,
D. C. & M.

Dep. of W. C. Fowlkes. Filed Jan. 25, '77. On Fees.

Q. Are you familiar with the litigation in this case, the value of the land in controversy, &c.; and, if so, what do you consider
291 a reasonable compensation for the services rendered by Messrs. Heiskell, Scott & Heiskell in attending to the same in the chancery & supreme courts?

Ans. I am familiar with the litigation in the above-entitled cause, having come into the case on behalf of the Jones heirs & creditors shortly before its final hearing in the chancery court & having argued it in the supreme court. I do not consider myself acquainted with the value of the land, never having been upon it, and know it only from the proof in the original case and from having read the depositions (taken on this reference) of W. P. Mitchell, F. C. Stephenson, J. C. Kelly, J. A. Levy, W. A. Wheatly, and D. H. Poston; therefore I cannot testify as to the value of the property—
292 as to the compensation due solicitors for Townsend. Upon the information that there was no contract as to fees, & that they have received nothing on fees except about $200.00 during the long period covered by this litigation, and from my acquaintance with the character of the case and with the character of the services rendered, I should say that anywhere between five thousand ($5,000.00) and seventy-five hundred ($7,500.00) would be a reasonable allowance to Townsend's solicitors. This estimate embraces entire services rendered in case.

Cross-examined:

1 X. What do you consider a reasonable compensation for the services of Mr. Townsend's counsel in the conduct of this
293 case in the inferior court?

Ans. It is very difficult to answer this question. This much by way of explanation: for the reason that the case was lost by Mr. Townsend in the court below, and the estimate I have made is based upon all the facts & circumstances connected with the case and final success in the supreme court. Being unable to answer the question directly, owing to the peculiar circumstances of the case, I would merely say that, inasmuch as the case was lost in the court below, had the connection with the case then & there terminated, that $1,000.00 or $1,500.00 might have been a reasonable fee, if paid or tendered then. If, however, the solicitors had then advised
294 an appeal, and were ready & willing to prosecute it, a much larger fee might have then been charged in case Mr. Townsend should have declined to take an appeal or retain them as counsel in the appellate court, say between $1,500 & $2,500.

And further deponent saith not.

W. C. FOWLKES.

Sub. & sworn to before me Jan. 25, 1877.

E. B. McHENRY,
D. C. & M.

Report of C. & M. as to Loaned Fund. Filed Jan. 16, '77.

Chancery C't of Shelby County.

ANNIE L. JONES *et al v.* D. H. TOWNSEND *et al.*

In response to the order of reference in this cause of Jan.
295 6, 1876, the master respectfully reports that he gave the sol'rs

for all parties due and legal notice of the taking of the ac. On the day designated no one appeared & no proof was offered, but from the papers in the cause & the books of M. D. Stewart, C. & M. of the late 2 chancery court, the following facts are found & reported:

On the 14th of Aug., 1871, the heirs of Wm. E. Jones, dec'd, paid into the hands of the said Stewart the sum of $1,615.00, which sum was furnished them by J. P. Kilbreth & R. C. Brinkley, the former furnishing $1,000.00 and the latter $615.00, which was, on the 27th of March, 1872, under order & agreement of that date, loaned to R. C. Brinkley, who execute- a note of that date for $1,615.00, payable four months after date, with 10 per cent. interest from date,
296 on which H. L. Brinkley was security. The interest to this date amounts to $775.62, making the total of principal and interest $2,390.62.

Respectfully submitted.

E. A. COLE, *C. & M.*,
By E. B. McHENRY,
D. C. & M.

Jan. 16, '77.

Order for Payment in of Fund. E. Jan. 26, '77. M. B. 16, p. 535.

ANNIE L JONES *et al.* }
v. } 3400.
D. H. TOWNSEND *et al.* }

It appearing from the clerk & master's report, filed herein on Jan. 16, 1877, that the fund of $1,615.00 in court in this cause was, on March 27, 1872, loaned out by the clerk and master under the order of the court, and that R. C. Brinkley became the
297 borrower of said money for the term of four months, payable, with ten per cent. int. from date, with H. L. Brinkley, as his surety, which note has not been paid, or any part thereof, and that there was due them at the date of said report, including the stipulated interest, the sum of $2,390.62; and it further appearing that the said fund of $1,615 was furnished to the complainants, the heirs of W. E. Jones, for the uses & purposes of this cause, by James P. Kilbreth and R. C. Brinkley, who were and are creditors of the said Jones estate, to wit, the sum of $1,000 by James P. Kilbreth & the sum of $615.00 by said Brinkley, and it being considered by the court that said fund, with its accretions, ought
298 now to be repaid into court in order that the parties who furnished the same may have it refunded to them with their several proportions of the interest or accretions thereon, it is accordingly, on motion of counsel for the complainants and for said Kilbreth, ordered that the said sum of $2,390.62 be now repaid into court by said R. C. Brinkley & H. L. Brinkley, and that the clerk & master call in the same to be paid into court by said Brinkleys in ten days after service of a copy of this order on them, and that the clerk & master issue at once a copy of this order to be served on said R. C. & H. L. Brinkley.

Dep. of Josiah Patterson. Filed Feb. 1, '77.

On fees.

299 I have been requested to examine the record in this cause, together with the brief of the defendants Townsend's counsel, and to fix what, in my opinion, would be a reasonable fee for the services performed by Messrs. Heiskell, Scott & Heiskell. I have not had the time to give the record that careful reading which a matter of so much importance would seem to require. However, I have looked into it sufficiently to give me, as I think, a general and a correct idea of the magnitude and extent of the litigation. In connection with the record I have also read the statement made by W. L. Scott, one of Townsend's solicitor's, as to the services performed by himself. It appears that some time in the year 1866
300 Townsend caused an execution which had been issued on a judgment obtained by him against W. E. Jones for something over $1,100 to be levied on a very valuable tract of land belonging to Jones, situated 4 or 5 miles from Memphis. At the sale of the land by the sheriff the same was bid off by Townsend for about $1,242. The tract thus purchased contained something over 640 acres. No steps were taken upon the part of Jones to redeem the land until after the expiration *for* the time for redemption. Townsend about this time advised very constantly with his attorneys, Heiskell, Scott & Heiskell, in regard to his right and legal ability to hold on to the land. The- advised Townsend that, in their opinion, he could recover
301 the land, but to take no action and wait until the other parties appealed to the courts. In the month of Feb., 1879, the bill in this cause was filed seeking to enjoin Townsend from committing trespass on the lands. The complainants were represented by able counsel and the litigation seems to have been from the beginning conducted with energy and ability on both sides. The judgment on which Townsend's execution was issued was attacked upon technical grounds, the validity of the sheriff's sale was attacked because the land was not sold in separate lots, and the entire transaction was vigorously attacked on account of the grossly inadequate price paid by Townsend for the land. These were some
302 of the principal grounds of the litigation. Quite a number of depositions were taken, and the case seems to have been carefully prepared for trial in the chancery court. In that court the sale was set aside on account of the gross inadequacy of the price and the complainants were permitted to redeem the land by paying Townsend his purchase-money with interest. The case was appealed to the supreme court of the State, where it seems to have been elaborately argued. In that court the decree of the chancery court was reversed, and it seems that Townsend, on his cross-bill, got all that he asked. The result of the litigation was that Townsend got over 640 acres of land for $1,242.97, estimated in the
303 chancellor's decree to have been worth at the time of the purchase at from thirty to fifty thousand dollars. It seems to have been a bold speculation upon the part of Mr. Townsend, and he chiefly invested in the enterprise the energy, ability, and fidelity

of his lawyers. The land was estimated by some of the parties to have been worth as high as $60,000. It is somewhat difficult to estimate a fee in a case like this. I think the fee should be measured in some degree by the nature of the transaction upon Townsend's part. Where an individual invests a small amount of money in an enterprise, such as a doubtfull title, I think the lawyer who conducts the litigation growing out of the transaction should be paid
304 a fee somewhat in proportion to the large benefit which has accrued to him. Then the amount involved and the character, extent, and difficulties of the litigation are all to be considered. When all these circumstances are considered in this case I would say that 20 per cent. on the value of the property would be a reasonable fee to be allowed Mr. Townsend's solicitors. It seems, however, that the land has greatly deteriorated in value since the commencement of the litigation. This fact, I should think, ought to be considered in estimating the fee as materially lessening it, in like manner as appreciation should materially increase the fee. The main facts, however, are to be found in the amount, the extent, and the difficulties
305 of the service performed. If the property had depreciated from $50,000.00 to $5,000.00 twenty per cent. on the $5,000.00 would evidently not be a fair compensation. Again, it should be considered that Mr. Townsend'- solicitors have been conducting this litigation with varying success for a period of eight years without any compensation up to this time. The labor of defendant's solicitors, their time and their talents, were invested in this litigation. In all business transactions investments, when properly made, yield a profit when clients are unable to pay or stipulate not to pay fees until the end of the litigation. Why should not the long and tedious delays to which counsel are subjected be taken into the ac-
306 count in estimating the fee at its termination? Had Mr. Townsend agreed to pay his solicitors twenty-five hundred dollars at the commencement of the suit and twenty-five hundred dollars at its conclusion, in view of the value of property at that time and the nature of the case, the amount would not have been considered unreasonable, yet the retainer of $2,500.00 would have yielded a profit at the legal rate of interest of $2,000.00 up to this time, making the $2,500.00 paid them equal to $4,500.00 paid now. In consideration of all the facts and circumstances of the case as I understand them I would say that five thousand dollars would be a reasonable and proper fee to be allowed Mr. Townsend's at-
307 torneys in this case. I fix this estimate in view of the fact that the property has probably depreciated in value one hundred per cent. since its purchase.

And further this deponent saith not.

JOSIAH PATTERSON.

Cross-examined:

1 X. Please state what you think would be a reasonable fee for the counsel of Mr. Townsend in the conduct of this case in the inferior court. You have stated what you think a reasonable fee for the services entire in all the courts. Please apportion the fee.

Ans. All the legal questions seemed to have been raised in the chancery court. There was nothing to do in the supreme [court] but to argue the case upon the record. The same attorneys
308 represented Mr. Townsend in both courts, and I think it might be safely said that three-fourths of the labor was done in the chancery court. This, of course, has reference to these particular attorneys, and to their labor. What I mean to say is that the attorneys who had conducted the case in the court below could afford to argue it in the supreme court for $1,250.00. Had Townsend employed new counsel in the supreme court I think the fee in that court should be much larger. In that case three thousand dollars, I think, would be a proper fee.

JOSIAH PATTERSON.

Sworn to & subscribed before me Febr'y 1, 1877.
[SEAL.] JNO. P. TREZEVANT,
Notary Public.

309 *Report [of] C. & M. as to Fees. Filed Febr'y* 17, 1877.

Chancery Court of Shelby County.

A. L. JONES *et al. v.* D. H. TOWNSEND & *al.*

In response to the order of reference in this cause, of date Dec. 19, 1876, the master respectfully reports that, after due and legal notice to the sol'rs for all parties interested of the time and place of hearing proof, &c., the said sol'rs came before him and took the depositions of W. A. Wheatley, F. C. Stephenson, J. C. Kelly, J. W. Levi, W. P. Mitchell, W. C. Fowlkes, D. H. Poston, and Josiah Patterson, & on this proof submitted the case. From this proof the master finds & reports that Messrs. Heiskell, Scott & Heiskell are enti-
310 tled to a fee of five thousand five hundred dollars ($5,500.00) for services rendered the defendant in the chancery & supreme courts.

Respectfully submitted,

E. A. COLE, *C. & M.*,
By E. B. McHENRY,
D. C. & M.

Feb. 17, '77.

Order as to Fund. Ent. M'ch 13, '77, *M. B.* 17, *p.* 250.

ANNIE L. JONES *et al.*
v.
D. H. TOWNSEND. } 3400.

In this cause, it appearing from the report of the C. & M., filed herein on Jan. 16, 1877, that of a fund of $1,615.00, formerly loaned out in this cause, and which was borrowed by R. C. Brinkley on the 27th day of March, 1872, the said Brinkley had originally furnished the sum of $615.00, & the remaining $1,000.00 had
311 been originally furnished by J. P. Kilbreth, of Cincinnati, & it further appearing that the sum now due of principal so

loaned out & interest thereon, & which has been ordered by the court to be paid in, still remains due to said R. C. Brinkley & said J. P. Kilbreth in proportion to the sums so furnished by them respectively, & it now appearing that said Brinkley has accounted for & paid over to said Kilbreth the sum due to the latter out of said fund, to wit, $1,000.00, with $495.00 interest thereon to March 10, 1877—total, 1,495.00—the receipt of which said Kilbreth, by his counsel, here acknowledges in open court, and that the said R. C. Brinkley is himself entitled to the remainder of said fund,
312 it is considered by the court that no necessity exists for the repayment of any portion of the fund into court, & the rule requiring said Brinkley to make such payment is now vacated & cancelled, and the matter of said loan is fully settled, & the C. & M. shall deliver to said Brinkley his note aforesaid for $1,615, dated Mar. 27, '72, & filed in this cause for cancellation, & his liability as borrower is hereby fully discharged.

Decree on Report as to Fees. Ent. Mch. 16, '77. *M. B.* 17, *p.* 322.

A. L. JONES *et al.*
v.
D. H. TOWNSEND. } 3400.

This cause coming on to be heard before the Hon.
313 R. J. Morgan, chancellor, on this the 16th Mar., 1877, on motion to confirm the report of C. & M. herein, filed the 17th day of Feb., 1877, which report allowed Messrs. Heiskell, Scott & Heiskell the sum of $5,500.00 as compensation for services in this case, & which report being unexcepted to is in all things hereby confirmed; & it appearing that the sum of $200.00 has heretofore been paid by def't to Heiskell, Scott and Heiskell on fee in this case, the same is ordered to be credited upon the amount by the C. & M. Judgement is hereby rendered in favor of Messrs. Heiskell, Scott & Heiskell for the sum of $5,300.00, & a lien having been declared in the supreme court on the land recovered in this
314 cause in favor of said Heiskell, Scott & Heiskell, said amount of $5,300.00 is hereby declared to be the sum secured to them by said lien on the land herein recovered by defendant or his assignee in bankruptcy.

Order of Sale. Ent. July 10, 1877, *M. B.* 18, *p.* 57.

A. L. JONES *et al.*
v.
D. H. TOWNSEND. } 3400.

This cause coming on to be further heard this day, & it appearing to the court that on the 16th day of Mar., 1877, a decree or order was entered in this cause confirming the report of the C. & M. filed herein on the 17th day of Feb., 1877, as to fees of Heiskell, Scott & Heiskell, & reciting that a lien had been retained
315 in the supreme court on the land involved in this cause in favor of said attorneys for fees & fixing the sum of fifty-three

hundred dollars ($5,300) as the amount so secured by said lien, and it appearing that the said sum remains wholly unpaid, therefore it is ordered, adjudged, & decreed that unless the said amount of $5,300.00 be paid into court within thirty days from the entry of this order the C. & M. shall advertize for sale the 640-acre tract of land involved in this cause, & which is more particularly described as follows, to wit: Beginning at the northeast corner of 2,250-acre tract, known heretofore as the Weaver & Turner tract, runs thence south, crossing Nonconnah creek, in all 61 chains & 87 links, to a
316 stake, the northeast corner of the S. E. division of said 2,250-acre tract; thence west with the north line of said S. E. division 106 chains 1 link to the central corner of all of said divisions; thence west with north line of Weaver 513-acre tract 60 chains 37 links to a stake on the north line of said 2,250-acre tract; thence east 57 chains 51 links to a stake near the bank of Nonconnah creek; thence north 78° east 9 chains 80 links, crossing said creek, to an elm on the east bank of the creek; thence 38 chains 90 links to the beginning, containing 640 acres, more or less; and, after giving 30 days' notice of the time, terms, & place of sale by at least four insertions in one of the daily newspapers published in the city of Memphis, shall proceed to sell the same,
317 or so much thereof as may be necessary to satisfy said judgment, at public auction for cash to the highest bidder, provided that if the firm of Heiskell, Scott & Heiskell, or either of them, become the purchaser they shall only be required to pay the amount of said bid over and above the amount of said fee. The C. & M. will make report of sale at the earliest date practicable.

Decree Conf'g Sale, Vesting Title, &c. Ent. Oct. 26, '77. M. B. 19, p. 414.

ANNIE L. JONES
v.
D. H. TOWNSEND. } 3400.

This cause coming on to be further heard on the report of sale heretofore filed in the cause, which report is in the words & figures following:

318 Chancery Court of Shelby County.

ANNIE L. JONES *v.* D. H. TOWNSEND.

The undersigned, clerk and master of the court aforesaid, begs leave to report that, in pursuance of a decree for sale entered in the above cause on the 10 day of July, 1877, after giving the required notice of the time, place, and terms of sale by advertisement in the Memphis Appeal, he proceeded to sell at public auction to the highest bidder, in front of the clerk and master's office, court-house building, Main St., in the city of Memphis, Tennessee, on Saturday, Oct. 13, 1877, within legal hours, and on the following terms, viz: cash, the following described property, situated
319 in Shelby county, Tennessee, to wit: Beginning at the northeast corner of a 2,250-acre tract, known heretofore as

the Weaver and Turner tract, runs thence south, crossing Nonconnah creek, in all 61 chains and 87 links, to a stake the northeast corner of the S. E. division of said 2,250-acre tract; thence west with the north line of said southeast division 106 chains 1 link to the central corner of all of said divisions; thence west with the north line of Weaver's 513-acre tract 60 chains 37 links to a stake on the north line of said 2,250-acre tract; thence E. 57 chains 51 links to a stake near the bank of Nonconnah creek; thence north 78° east 9 chains 80 links, crossing said creek to an elm on the east bank of the creek; thence 38 chains 90 links
320 to the beginning, containing 640 acres, more or less, when and where same was struck off and sold to Heiskell, Scott & Heiskell at and for the sum of fifty-three hundred dollars, theirs being the highest and best bid offered therefor. Inasmuch as said purchasers own the judgment herein, to satisfy which said sale was made, amounting to $5,300.00, which will exceed the purchase after adding interest to said judgment and deducting the costs of suit, amounting to $——, from the purchase-money, they will not be required to pay in the entire purchase-money; and having assumed the costs aforesaid, which will remain a lien on the property
321 till the same are paid, they are entitled to decree conf'g sale and vesting title subject to said lien, &c.

Respectfully submitted.

E. A. COLE, *C. & M.*
R. J. BLACK, *D. C. & M.*

Oct. 13, '77.

And the said report being unexcepted to is in all things confirmed.

It is therefore decreed that all the right, title, and interest of D. H. Townsend or his assignee in bankruptcy, T. P. Winchester, or of any party or parties complainant or defendant in and to this land, be divested out of any and all of them and vested in J. B. Heiskell, W. L. Scott, & C. W. Heiskell, formerly composing the firm of Heiskell, Scott & Heiskell, who, as appears from the report herein, became the purchasers of said land at the sale, and, if necessary,
322 the C. & M. will issue a writ of possession to put said purchasers in possession of the tract of land described in the report.

On, to wit, June 17, 1881, the following proceedings were had and appears of record, to wit:

Final Decree.

T. P. WINCHESTER, Trustee,
v.
J. B. HEISKELL *et al.* } 3525.

Be it remembered that this cause [came] on to be heard before the Hon. W. W. McDowell, chancellor, &c., on the bill, answer, exhibits, the proof on file, agreements of counsel, and the records referred to in said agreements, and it appearing to the court that the com-

plainants are entitled to no relief, it is ordered, adjudged, &
323 decreed that the bill be dismissed. It is further ordered that the respondents recover of complainants and surety all the costs of this cause, for which execution may issue.

From this decree the complainants pray an appeal to the next term of the supreme court of Tennessee, to be held at Jackson, for the western division of the State, on 1st Monday in April, 1882, which appeal is granted on condition that compl'ts execute an appeal bond, with security satisfactory to the clerk, conditioned as prescribed by law, in the penalty of $250, within sixty days from this date.

It is ordered, by consent and agreement of parties, that the clerk in making out the transcript copy into it only such parts of
324 the record in the case of "Jones *vs.* Townsend," mentioned in the agreement of counsel on file, as accrued after the case was remanded from the supreme court under its decree in 1876. It is agreed that the transcript of that cause, now on file in the supreme court, may be used on the trial of this cause in that court in the same manner and with like effect as if it were again copied into this record. It is further agreed that the record in case of Ben. May *et al. vs.* T. P. Winchester & *al.*, mentioned in the agreement, in which compl't, T. P. Winchester, was appointed as trustee in the place of G. W. Winchester, dec'd, trustee under the D. H. Townsend
325 trust deed, need not be copied into the transcript, the def'ts now withdrawing objections to the regularity of said proceedings and agreeing to make no point on said proceedings in the supreme court.

Appeal Bond. Filed July 11, '81.

We, T. P. Winchester, W. S. Staley, E. B. McHenry, receiver Hernando Ins. Co.; Ben. May, S. S. Jobe, adm'r of S. M. Jobe, dec'd, & Taylor, Joy & Co., for use of W. F. Taylor, appellants and surety, acknowledge ourselves indebted to J. B. Heiskell & *al.*, appellees, in the sum of two hundred & fifty dollars: to be void if the said T. P. Winchester and others, named above as appellants, who have prayed for and obtained an appeal from a decree of the chancery
326 court of Shelby county in a cause in which T. P. Winchester *et al.* — complainants and J. B. Heiskell & *al.* defendants to the next term of the supreme court of Tennessee for the district of West Tennessee, to be held at Jackson, Madison Co., on the first Monday in April next, shall pay all such costs as shall be awarded against them by said supreme court.

This 8th day of July, 1881.

E. B. McHENRY,
Receiver Hernando Ins. Co.,
By S. H. DUNSCOMB, *Pres't.*
S. H. DUNSCOMB.

STATE OF TENNESSEE, }
Shelby County, } *ss:*

I, Robert J. Black, clerk & master of the chancery court of
327 Shelby county, do hereby certify that the foregoing 314 pages

comprise a full, true, and perfect transcript of all the proceedings had in a certain cause lately pending herein, wherein T. P. Winchester, tr., *et al.* are complainants and J. B. Heiskell *et al.* are defendants, as the same appear of record and on file in my office.

In witness whereof I hereunto set my hand and affix the seal of said court, at [my] office in Memphis, this 19th day of October, A. D. 1881.

[SEAL.] R. J. BLACK, *C. & M.*

328 & 329 T. P. WINCHESTER, Trustee, &c., *et al.*,
v.
J. B. HEISKELL *et al.*

From the chancery court of Shelby county, Tenn.

On the 12th of Feb'y, 1880, T. P. Winchester, as trustee, and the other compl'ts, as beneficiaries under a trust deed executed by D. H. Townsend, filed their bill in the chancery court at Memphis against the defendants, seeking to have the claim of title of defendants declared invalid and removed as a cloud upon the complainants' title, and for possession of the tract of land in the bill, in order that the trustee may execute his trust, &c.

On final hearing the bill was dismissed by the chancellor, and the complainants appealed to the supreme court.

The facts of the case are as follows:

330 One D. H. Townsend obtained a judgment in the circuit court of Shelby county on the 6th of June, 1866, against one W. E. Jones for $1,188.25 and costs; that execution issued on said judgment on the 23rd of June, 1886, and was, on the 9th August, 1866, levied on the lands described in the bill as the property of said Jones, and on the 12th of Sept., 1866, sold by the sheriff and purchased by Townsend at and for the price of $1,242.97, being the amount of judgment, interest, & costs. The time for redemption having expired without having been redeemed, and Townsend having paid the costs, &c., and satisfied his judgement, the sheriff executed him for the land on the 28th of March, 1868, and deed — duly acknowledged and recorded. Before the execution of the deed and before the time for redemption expired said W. E. Jones died intestate, leaving a widow, Annie L. Jones, and several children. Dower was assigned to said widow out of the lands.

331 In January or February, 1869, Annie L. Jones *et al.*, widow and children of said W. E. Jones, filed their bill and amended bill, in the chancery court at Memphis, *v.* D. H. Townsend, to recover possession of said land and have the sale to Townsend by the sheriff set aside and the sheriff's deed cancelled, &c., and to redeem, &c., the land so sold and purchased by Townsend at said execution sale by the sheriff, it being the land in controversy.

W. L. Scott, one of the defen'ts, as a member of the law firm of Humes, Scott [&] Poston, having obtained the judgement and procured the sale of the land, and afterwards, as a member of the law firm of defendants, Heiskell, Scott & Heiskell, having prepared the title papers, &c.:

The defendant, D. H. Townsend, employed the defendants, Heiskell, Scott & Heiskell, to defend said suit and protect his title
332 to said land. They answered the bill for him and filed a cross-bill to have his title declared and quieted and obtained an injunction, &c.

The chancellor decreed in favor of complainants, Annie L. Jones *et al.*, and on appeal by Townsend to the supreme court the decree of the chancellor was, at the September term, 1876, to wit, 8th of December, 1876, reversed and the bill dismissed, and the supreme court on the cross-bill decreed as follows: "And it appearing that said Townsend is entitled to the relief prayed in his cross-bill to have his title declared and quieted, it is, therefore, adjudged and decreed that the said Townsend has a good title to the said tract of [land] and premises by virtue of his said purchase and sheriff's deed in fee-simple."

On the 18th of June, 1875, and pending this suit of
333 & 334 Jones *et al. v.* Townsend, D. H. Townsend executed and delivered his trust deed of that date to George W. Winchester as trustee, whereby and wherein he conveyed certain real estate therein mentioned and described in trust for the purposes and upon the trusts therein set forth. Amongst other property therein conveyed is the tract of land of 646 acres in controversy in this case. All the other property conveyed in said trust deed has been sold by the trustee and proceeds prorated among the creditors secured, leaving complainants' debts unpaid as charged. Each of complainants have proved their debts. The objects and purposes of said trust as set forth in the trust deed are as follows. (We copy:) "This conveyance, however, is in trust for the following uses and purposes and none other—that is to say: Whereas Ben. May is bound for me as endorser upon the following-described notes and bills, to wit:

335	One note due Hernando Insurance Co. June 16th, 1875, for	$1,153 71
One due 4th Nat. Bank 29 June		125 00
" "	Hernando Ins. Co. 8 July, '75	1,500 00
" "	Taylor, Guy, &c., 10 July, '75	284 00
" "	Hernando Ins. Co. 21 July, '75	2,500 00
" "	P. Tuggle June 28, '75	700 00
" "	S. M. Jobe July 30, '75	150 00
" "	Planters' Ins. Co. Aug. 4, '75	1,250 00

And whereas I am also indebted to Ben. May in the further sum of $526.41 by note held by him due on 4th of Nov., '74, being a note taken up by him as endorser, and he is also bound as endorser for me on a note held by Judge Ellett due July 15th, 1875, in the sum of $1,000.00; and whereas also W. S. Staley became bound as my security on an appeal bond in the case of Marr *et al.* against the Bank of West Tennessee in the 1st circuit court of Shelby county in the sum of about $8,000.00, and being desirous to indemnify and save harmless the said May & Staley from the liability thus
336 incurred as surety and *and* endorser:

Now, if said party shall be constrained to pay off and discharge any of these liabilities, and I shall fail to reimburse the amount thus paid within a period of two years from the date of these presents, then I authorize & empower my trustee * * * to sell the property conveyed or so much as may be necessary to raise the money adequate for the payment and discharge of such liabilities.

The trustee will apply the proceeds of sale—

First. To the payment of the costs of *of* executing this trust.

Second. To the payment of these liabilities or such *such* as have accrued and fallen upon said endorsers, it being intended to place them both on an equal footing.

And, lastly, to pay the remainder, if any, to me."

337 Ben. May and Staley are both insolvent and non-residents of the State.

The amount realized by the trustee from the sale of property is insufficient to pay off the debts.

Judgement has been rendered on the bond, but Staley has paid nothing on it. The liability of May, as endorser, has been fixed, and the debts of the complainants' beneficiaries have accrued and fallen upon said indorser, May, and the debt of Bank of West Tennessee has accrued and fallen upon Staley. The debts of the complainants' beneficiaries are debts secured by said trust deed.

On the 30th of Nov., 1875, D. H. Townsend filed his petition in bankruptcy, and on the 12th of Jan'y, 1876, complainant Winchester was appointed or elected his assignee in bankruptcy.

On the 17th Feb'y, 1876, all of the assets of Townsend were conveyed to said assignee by deed in the ordinary form of such

338 conveyances, and none of this tract of 646 acres involved herein was among the property set apart to said bankrupt as exempt under the bankrupt law.

On the 13th of December, 1875, Townsend was declared a bankrupt, and on the 14th of March, 1881, received his discharge. His assignee has paid to the creditors of bankrupt out of his estate 21¼ per cent. on their claims proven—said claims aggregating $26,012.58.

Complainant E. B. McHenry is the duly appointed receiver of the assets of the Bank of West Tennessee.

G. W. Winchester, the trustee in said trust deed, died in 1879, & on 21 April, 1879, T. P. Winchester, one of the complainants, was duly appointed trustee in his room and place by proper proceedings for that purpose by decree of the chancery court of Shelby county,

Tenn., and duly invested with the title to the property therein

339 conveyed and described, and with all the powers therein granted.

During the pendency of the suit of Annie L. Jones *et al. vs.* D. H. Townsend said Townsend purchased her dower interest in said land for $2,500.00.

The defendants, Heiskell, Scott, & Heiskell, faithfully and efficiently represented D. H. Townsend in said cause of Annie L. Jones *et al. v.* him, and faithfully and successfully prosecuted the cross-bill in said cause. In the decree of the supreme court in said cause of

December 8th, 1876, the supreme court decreed and adjudges as follows: "And it appearing to the court that there is a fund in the possession of the court below deposited for the redemption of the land in dispute, to which fund the complainants are entitled, and it being proper for the said court to take order therein, and it being
340 suggested to the court that pending the proceedings in this court the title of the said Townsend has been assigned to Thomas P. Winchester, Esq., his assignee in bankruptcy, it is, with the consent of said Townsend, by his counsel, ordered that the said Winchester be made a party to this decree, and by consent this cause is remanded to the chancery court of Shelby county to take order in relation to the fund above named and to take an account and make report of the reasonable counsel fees of the counsel, Heiskell, Scott, & Heiskell, for which a lien is hereby declared on the premises in controversy, the said Winchester asking that said account be taken then."

The cause was remanded and reinstated on the dockets of the chancery court of Shelby county by *procedendo*. The account of counsel fees [was] taken, and the clerk reported $5,500.00. The report was confirmed, and the land, in default of payment of the fees within
341 30 days, ordered sold to satisfy same. The $5,500.00 reported by the clerk was by the defendants credited by $200.00, paid by Townsend, and the amount allowed them was reduced to $5,300.00. There was default of payment, and the land [was] sold and purchased by defendants, they bidding the sum of $5,300.00. By decree of the court they were allowed to bid on said land, paying all on their bill, if any, over amount of their debt. This sale was on the 13th of Oct., 1877. Report of sale was confirmed on the 26th Oct., 1877, and decree divesting all right, title, and interest of D. H. Townsend, or his assignee, T. P. Winchester, or any other party or parties, complainants or defendants in and to said cause, divested out of them and vested in J. B. Heiskell, W. L. Scott, and C. W. Heiskell, formerly composing the firm of Heiskell, Scott and Heiskell, and order for writ of possession to issue.

342 The fund in the court paid in for redemption of the land was paid over to the party entitled to it by order of the court.

T. P. Winchester, assignee in bankruptcy of Townsend, took possession of this property and rented it out for the years of 1876 & 1877, and *that* his tenants were in possession in 1877 when defendants took possession of the land; that *than* is shown in this report and the record and proof in the cause [that] the assignee and creditors of said Townsend have set up no claim to this property.

The value of said land, as shown by the proof of the witnesses on taking the account of counsel fees, was over $20,000.00. Neither the trustee nor any of the beneficiaries under the trust deed were before the court, or entered an appearance before or after the cause was remanded to "take order" or take the account of counsel fees; nor were they, or either of them, brought before the court, or any
343 steps taken to bring them before the court after the cause was remanded to take the account for counsel fees or for any other

purpose, nor were they parties to said cause at any time or for any purpose. The Hernando Ins. Co. knew from outside knowledge that said account was being taken, and perhaps the trustee knew it. The assignee, on 27th Feb'y, 1879, sold at public sale the right of redemption in and to said 640-acre tract land, and the Hernando Ins. Co. became the purchaser of said equity of redemption for $25.00, and executed deed to the purchaser.

The land sold and purchased by defendants, as stated herein, was sold subject to redemption. In the trust deed the equity of redemption is waived.

The bill alledges that defendants had a lien on the land for their professional services, and that Townsend [had] no notice or knowledge that defendants claimed a lien on the land, and [was] ignorant of the decree declaring the lien until after the cause was
344 remanded, & that the decree declaring the lien is void and inoperative as to them and Townsend, and that the chancery court had no jurisdiction to take the account of counsel fees and order sale of the land; that same was a new suit and jurisdiction was exclusive in bankrupt court, being a matter in bankruptcy.

The bill alledges that compl'ts are not estopped or bound by the said decree or proceedings in the supreme court or chancery court. The bill also charges that defendants contracted and agreed to defend said suit for a fee of — thousand dollars and were not to charge more for their services. This the answer denies and states that they had no contract or agreement as to their fees.

Townsend owed defendants several hundred dollars for professional services on other matters. Townsend paid them $590.00. They state in their answer that they applied this to other fees
345 except $200.00, and that there is $30.00 he is still entitled to credit for, making $230 that he is entitled to credit for on this fee. The proof of the witness-, D. H. Townsend and Spicer and Staley, were not taken on the reference as to their fee, but their depositions taken in this cause and from entry on the books of Heiskell, Scott and Heiskell, which is as follows:

"D. H. Townsend, Dr.

"Sept. 23, '69.—To retainer in defence case of W. E. Jones' heirs *vs.* you, in chancery court, $500.00."

This entry is in handwriting of W. L. Scott. We report that there was a contract to defend said suit for $1,000.00 made between D. H. Townsend and W. L. Scott, for firm of Heiskell, Scott & Heiskell—$500.00 unconditionally and $500.00 if successful, making in all $1,000.00; that on this fee $230.00 *has* been paid [for] taking the testimony of Townsend, Spicer, Staley, and Scott, and the entry [is] on the books of Heiskell, Scott and Heiskell, made by Scott. We report that this proof clearly establishes this contract.
346 No proof was taken as to this contract, and Townsend declined to be a witness on the reference for said counsel fees, and no question as to this contract was made on said reference.

The assignee in bankruptcy, Winchester, as such assignee contested

upon said reference the amount of the fee. The complainants did not by their action in any way waive any rights they had in regard to said reference or sale. The entry on the books of Heiskell, Scott and Heiskell strongly corroborates the witnesses, Townsend, Spicer, & Staley. On same day of this entry and just preceeding it is an entry, "Cr. by $50.00, am't p'd on fees in this case of Jones *vs.* Townsend," and also entry charging Townsend 1.50 cash, paid costs for him in this case. The making of these entries doubtless called to his mind the contract, and hence the entry of that date.

The law of the case is as follows:

347 It is insisted that the deed of trust is merely a personal indemnity to secure May and Staley, and that, as they have paid no debts, *that* the complainants' beneficiaries have no interest in it, and that it does not inure to the benefit of the creditors.

The deed of trust, as we have quoted heretofore in this report, provides—first, for the payment of the costs of executing the trust; second, to the payment of these liabilities or such as have accrued and fallen upon said endorsers, &c. (meaning and contemplating the payment of all these liabilities, if outstanding, or that might remain outstanding).

These liabilities and debts had accrued and fallen upon May as endorser, and judgement had been taken on the bond that Staley was surety on. Both May and Staley are insolvent, the debts — paid by May and the debt secured going to May inures to the

348 benefit of the creditors on whose debts he was bound as endorser.

And we hold that the security is both for the personal indemnity of the surety and operates as a security for the debts, and so inures to the benefit of the principal creditors.

Jones on Mortgages, sec. 385–'7.
3 Heiskell, 525, 5th Cald., 392.
Bant on Suretyship, sec. 383 '4, '5, & 190.

Hence complainants have such an interest as entitles them to maintain this bill.

As to the question whether def'ts are entitled to a lien on the land for their counsel fees, the supreme court has declared the lien, and we think very correctly and properly, and that question is settled by the supreme court in its decree of 8th of December, 1876, and the declaration of the lien by the supreme court binding on the parties.

The decree of the supreme court was a final settlement of

349 all the matters in controversy. The supreme court did not undertake to fix the amount of the fee or order a sale of the lands. The remanding to take an account and make report as to counsel fees was not a continuation, nor did it make such "account" and "report" a continuance of the original suit nor make such action a part of the original suit by which purchasers, *pendente lite*, are bound. This remanding was a mere matter of convenience, and doubtless designed to give counsel an opportunity, by appropriate proceedings, to enforce the lien.

The rule is well settled that where the amount of fee is not fixed by agreement the court will do nothing but declare the lien and leave the counsel to take such action against their clients by petition or otherwise as they see proper to have the amount fixed and lien enforced. 9th Heiskell, 95. But such action is not the old suit, nor a continuation of it, but is a new suit by counsel
350 against the client, and of which the interested must have other notice, and — which it is settled that purchasers *pendente lite* are bound by the results of the suit pending which they purchase.

Story Eq. Jur., sec. 406.

It cannot be held for the same reason that they are bound by the result of this independent and new litigation between counsel and client. (See 9 Heisk., page 95 *et seq.* on fee.) In this case no petition was filed nor any appropriate proceedings taken, but the amount and enforcement of the lien was determined and decreed after an account and controversy between the counsel and assignee (of the bankrupt Townsend) of the client, and this upon the theory that as to the client the assignee represented not the debt but the land. Ordinarily this would be correct, and perhaps the appearance and contest of the assignee would have been a waiver of any petition or
351 pleading on that question, as he did for this reason object. But in this case he did not have the superior right to the land about which he made the contest. That right was in the trustee, G. W. Winchester, and beneficiaries under the trust deed, and such appearance and contest by the assignee did not waive and could not conclude their rights, they not being parties.

In view of the attitude [in] which they stood to this land they were the parties to have made defence, no petition being filed against them and they not being parties to the proceedings to fix the amount of the fee and to have sale decreed.

The proceedings are void as to them and interposes no obstacle in the way of the relief now sought to be set up — amount of the fee by contract, and insist that only the amount agreed upon be allowed and charged upon the land.

352 This proceeding in the chancery court on the reference as to the amount of the fee, &c., is not such a matter in bankruptcy as is contemplated by sec. 711 of the Revised Statutes of the U. S., 1874, especially under the facts and circumstances of this case. See 2nd Lea, 199; 3rd Lea, 296. There should have been no reference to ascertain the amount of the fee. The amount had been settled by contract and fixed at $1,000.00, and the parties could not charge more. While the Messrs. Heiskells were not informed of this contract, yet their partner, Scott, although he has forgotten it, made the contract, and they, as well as he, *is* bound by it.

The reference in chancery court and report and sale and purchase, &c., by def'ts of the land is a nullity and not binding on complainants, and should be so decreed.

353 The defendant's lien having been declared and fixed upon the land by the supreme court, and properly so, they are en-

titled to have said lien satisfied out of said land for the payment of the amount of their fee, $1,000.00, as per their contract. It appears that they have been paid $230 on their fee. They are entitled under their contract to balance of fee, to wit, to $270 and interest, and interest on same from date of their employment, say 16th Feb'y, 1869, to date of payment of same, and to $500.00, with interest on that amount, from 8th December, 1876, date of final decree in supreme court, to that of payment of same, and to their lien for same.

The decree of the chancellor should be reversed, and decree of reference and report as to fee and confirmation of same, and sale of land and confirmation of sale, and decree for title should be
354 set aside and for naught held, decreed void as to complainants, and the title of def'nd'ts by reason of same should be by decree of supreme court set aside and for naught held, and their title removed as a cloud upon compl'ts' title, and possession of said land should be delivered up to the trustee and the clerk of [the] supreme court [to] sell. The sale will be for cash, and proceeds applied—1st, to payment of costs; 2nd, to amount due def'ts, and balance to complainants. The costs of this court and court below should be retained by the clerk out of the proceeds of sale of the land.

A. D. BRIGHT.
D. L. SNODGRASS.
E. L. GARDENHIN.

(Endorsed:) 851 Shelby C. D. T. P. Winchester, tr., *et al. v.* J. B. Heiskell *et al.* Report. Filed April 12th, 1884. S. D. Hays, cl'k, by Chas. D. Conger, D. C.

355 T. P. WINCHESTER, Trustee, *et al.* *v.* J. B. HEISKELL *et al.* } 851. Shelby County Chancery Docket.

The defendants except to the report of the referees in this case for reasons, as follows:

(1.) They misconc*on*strued the deed of trust of Townsend to Winchester, trustee. The portion of said deed material to be noticed is as follows: Rec., pp. 34 & 35. "Being desirous to indemnify and save harmless said May and Staley from the liability thus incurred (the deed before this having set out the debts on which May and Staley were endorser and surety for Townsend) as surety and endorser: Now, if said parties shall be constrained to pay off and discharge any of their liabilities, and shall fail to reimburse the amounts thus paid within a period of two years from the date of these
356 presents, in this event only the deed authorizes a sale, and in this event the trustee is to sell the same (the tract of land in controversy and other property mentioned in the deed), or so much thereof as may be necessary to raise the money adequate for the payment and discharge of such liabilities. The trustee will apply the proceeds of sale * * * to the payment of these liabilities, or such as have accrued and fallen upon them."

The referees construe this to give the power of sale to the trustee when May and Staley become liable to pay the debts mentioned in the deed of trust; whereas the only true construction of said deed of trust is that the power of sale should exist only in the event May and Staley paid any of the debts or liabilities in the deed set forth and Townsend failed to reimburse them, and then only to sell enough to repay what they had paid, and as what they had in fact
357 paid was more than covered by proceeds of sale, made before the filing of this bill, of other property in the deed set forth, when the trustee sold this he exhausted the powers conferred, and as May and Staley are both insolvent and non-residents, and as now all claim against them is barred by the statute of limitations, further power of sale will never arise.

(2.) The report fails to find the fact that Staley, at the date of the trust deed, was bound absolutely and as fully as he could ever be by a judgement against him as surety on Townsend's appeal bond rendered in 1873, and that some of the claims upon which May was endorser had not accrued when the said deed of trust was executed, but that all of same fell due more than six years prior to the time of the referee's report. Rec., pp. 5 & 6. Deposition of E. B. McHenry, Rec., p. 211.

358 (3.) Defendants except to that part of the report of the referees which finds as a matter of fact that Heiskell, Scott and Heiskell contracted with D. H. Townsend to perform their professional services in the case of Annie L. Jones *v.* D. H. Townsend for the sum of $500.00, fixed fee, and $500.00 contingent upon success in suit. (For references to testimony in record see brief filed herewith.)

(4.) Defendants except to the report, in that it finds that neither the trustee nor any of the beneficiaries under the trust deed were before the court or entered an appearance before or after the cause was remanded to take orders or take the account as to counsel fees, nor were they or either of them brought before the court or any steps taken to bring them before the court after the cause was remanded to take the account for counsel fees or for any other purpose, nor were they parties to said cause at any time or for any purpose.

359 The referees imply by their findings that the trustee and beneficiaries in the deed of trust were necessary parties to the reference, when the assignee in bankruptcy, in whom the benefit of the decree was vested by the supreme court, was the only necessary party.

(5.) The referees should have found that the trustee and the beneficiaries, or at least the principal, and the Hernando Ins. Co. had actual knowledge of the reference, asked delay in it, and was offered every opportunity to appear and contest the fee of Heiskell, Scott and Heiskell. Depositions of F. H. Heiskell, Rec., 181; of T. P. Winchester, Rec., 140–141; of C. W. Heiskell, Rec., 156–159. They should also have found that E. B. McHenry, receiver of the Bank of West. Tenn., was the deputy clerk & master who took the account as to said fee and made the report. Rec., 299.

360 (6.) The referees fail to find T. P. Winchester, Townsend's assignee in bankruptcy, agreed with defendants that they should go on and prosecute the suit in the supreme court and look to the land for their fees. Depositions of T. P. Winchester, Rec., 129; of J. B. Heiskell, Rec., 201–202.

The referees should have reported that, no matter what the contract was with Townsend, upon his bankruptcy his assignee had a legal right to make a new contract with the defendants.

(7.) While the referees find that Townsend filed his petition in bankruptcy Nov. 30, '75, and Winchester was appointed assignee Jan'y 12, '76, they fail to find that during the time of the reference as to fee, and for some time thereafter, the def'ts might have filed their claim with the assignee, and that, relying upon the agreement with —, upon their lien on the land, and upon the conduct of complainants in not notifying them of a proposed contest, the
361 said defendants did not file their claim against the bankrupt estate, and that when this suit was brought the time for doing so had expired. See deposition of F. H. Heiskell, Rec., 180.

(8.) The referees fail to find that these complainants, with the full knowledge that *that* this proceeding to ascertain fees was going on, and that the assignee in bankruptcy was assuming under the order of the supreme court that the recovery was for his benefit, as assignee, to represent the defence and all the interest involved, permitted the proceedings to go on without such objection and allowed the defendants to act and proceed under the belief that they did not object to the manner of proceeding. They fail to find that good faith required the complainants to notify the defendants that they did not intend to be bound by the proceedings or to be represented by the assignee.

362 (9.) They fail to find that the trustee, G. W. Winchester, permitted T. P. Winchester to represent the estate and the interest of all parties without objection, and acquiesced in his representation.

(10.) They fail to find that as matter of law a prior encumbra-cer is not bound to make a puisne encumbrancer a party and that a fair opportunity to such latter encumbrancer is sufficient to bind him.

(11.) Defendants except to the report of the referees in that it holds the law to be that "the remanding the cause by the supreme court to take an account and make report as to counsel fees was not a continuation nor did it make such account and report a continuation of the original suits nor make such action a part of the original suit by which purchasers *pendente lite* are bound."

(12.) Defendants except to so much of the report of the
363 referees as holds that, though the assignee in bankruptcy by appearance and contest as to defendants — for waiving the necessity of a petition by defendants, yet this did not bind the trustee in the deed of trust or the beneficiaries or the complainants, and that such appearance and contest did not waive the rights of complainants and could not conclude them, they not being parties.

(13.) The defendants except to the report, in that it holds the pro-

ceedings by which defendants' fee was fixed void as — complainants, and that it interposed no obstacle in any way to the relief now sought—to set up the amount of the fee by contract.

(14.) The defendants except to so much of the report of the referees as holds that "the referees in chancery court *and* report, and sale and purchase, &c., by defendants of the land is a nullity and not binding on complainants."

364 (15.) The referees give no effect to the order of the supreme court vesting the title in Winchester, who alone came forward and asserted his claim, as he had a right to do and as the trustees might have done under the Code, S. 2845, whereas the said order of the supreme court was conclusive as to who were necessary parties to the reference.

(16.) Defendants except to the report in this, that while the referees find that "the value of said land, as shown by the proof of the witnesses on taking the account of the counsel fees, was over $20,000.00, they failed to find that after the purchase by defendants, and after the two years allowed for redemption had expired, defendants still proposed to the Hernando Ins. Co. to take their fee as fixed by the court, with interest, and release the land. Deposition of C. W. Heiskell, Rec., p. 163.

HENRY CRAFT,
T. B. TURLEY,
Sol's for Def'ts.

365 *Brief in Support of Defendants' Exceptions.*

T. P. WINCHESTER, Trustee, *v.* J. B. HEISKELL *et al.*

In support of defendants' first exception they submit the following brief:

(1.) The amounts actually paid by May (Staley paid nothing) was $1,351.41. Record, p. —. This was more than covered by proceeds of sale of other property embraced in the deed of trust. These proceeds were (net) $2,429.15.

Winchester's dep., ans. 3 f.

If the proper construction of the deed is that *that* the power of sale existed only in the event and to the extent of actual payments, the complainants had no interest in the property in controversy.

This is manifest from these considerations:

(1.) Complainants' equity rests upon the doctrine of subrogation or substitution, and the creditor cannot claim the security unless the surety had a right to come upon it.

1 Lead. Ca. in Eq., p. 164.

366 Bibb *v.* Martin, 14 Sm. & Mar., 87.
Bush *v.* Schaps Stamps, 26 Miss., 4 Cushman, 463.
Horner *v.* Bank, 7 Conn., 478.
Brant on Suretyship, S. 282.
Ohio Ins. Co. *v.* Ruder, 18 Ohio, 46–7.

This deed of trust is for the personal indemnity of the sureties to

repay what they have to pay and is not for the payment of the debt.

Above authorities:

Brandt on Suretyship, 454.
Osborne *v.* Noble, 46 Miss., 449.
29 Conn., 26, 16 *Ib.*, 139.
1 Leading Cases in Eq., p. 175.
Russell *v.* Clark, 7 Cranch, 94.

Tennessee cases in accord:

Gilham *v.* Esselman, 5 Sneed, 86–88.
Williams *v.* Tipton, 5 Hump., 170.
Jones *v.* Hamlet, 2 Sneed, 261.
Woods *v.* Moon, Thompson's Cases, 177.
Kennedy *v.* Pitts, 5 Sneed, 92–93.
(Especially) Pl. B'k *v.* Douglas, 2 Head, 699.

367 1st & 2nd exceptions.

The true construction of the deed seems to be simple enough if we seek to discover what the parties mean from their language. If the sureties are constrained to pay [it] seems to embrace simply two ideas: First, they must be constrained; second, they must pay. When they have thus paid on compulsion and Townsend has failed to reimburse, the trustee is to sell. Now the principle upon which all trust- are construed is that the trust or estate is measured by the needs of the trust. The natural inference from the trust would be that the sale would be of such property as would enable the trustee to do what the maker undertook and failed to do—reimburse what the surety paid on compulsion. It may be that language could be framed which would satisfy the court that the power of sale was to go beyond the trust, but such language must be very plain. The declaration of trust is what the draftsman is supposed to frame with care. Here he has done it with a clearness that cannot
368 be surpassed. When he comes to provide a power to carry the trust into effect that power must be reconciled to the trust declared and not extended beyond it, unless it is still clearer than the trust itself and inconsistent with it. Now, when we look for matter in the power of sale inconsistent with the trust we find that which is capable of a construction inconsistent with the trust, but it is a construction less natural and more constrained than the reading which carries out the trust exactly, and no more. Certainly no sale is to take place but on the three conditions, 1, constraint; 2 payment; 3, failure to reimburse; but in the quantum of the sale perverse *engi*nuity can extend the power. The power is to sell the property, or so much as may be necessary, to raise the money adequate to the payment and discharge of such liabilities. As there may well be such liabilities as the trustee had the right to sell for, the power ought to have that extent, no more. Such liabilities as the sureties have been constrained to pay, and which being so paid Townsend

369 has failed to reimburse, the payment is to be made of these liabilities, or such as may have accrued and fallen upon them. Now upon what fair principle of construction of the words accrued or fallen upon — be disregarded? A part of the debt had accrued, become due; a part had not. None of these debts that did not accrue were to be paid, nor were any to be paid until they had fallen upon the sureties. Now, there were debts that had fallen upon Staley in one sense. There was a judgement of the supreme court against him, but Townsend does not in the trust provide for the debt so fallen. He does provide that if he shall be constrained to pay that debt, then the trust shall be put in operation. Now, fallen upon may as well mean by constraint to pay as by judgement merely, and that this is the meaning here is plain, because that is the sort of falling upon on which as sale is to be made. This is in fact far the most appropriate sense to give to a figurative word or phrase which means dropping, descending, striking, as it
370 most properly fits *hitting* by contract and not by judgement, and, as that is most consistent with the plainly-declared purpose, it can only by perversion be made to mean judgement to pay.

3rd exception.

As to the contract to defend the suit for $1,000 the report says:

"The proof of the witnesses, D. H. Townsend, Spicer, and Staley, *were* not taken on the reference as to their fee, but their depositions taken in this cause and from entry on the books of Heiskell, Scott and Heiskell, which is as follows:

D. H. Townsend, Dr.

Sept. 23, '69.—To retainer in defence case of W. E. Jones' heirs *vs.* you in chancery court, $500.

This entry is in handwriting of W. L. Scott. We report that there was a contract to defend said suit for $1,000 made between D. H. Townsend and W. L. Scott, for firm of Heiskell, Scott and Heiskell—$500 unconditionally and $500 if successful, making in all $1,000.00; that on this fee $230 has been paid. Taking the
371 testimony of Townsend, Spicer, Staley, and Scott and the entry on the books of Heiskell, Scott and Heiskell made by Scott, we report that this proof clearly establishes this contract. No proof was taken as to this contract, and Townsend declined to be a witness on the reference for said counsel fees, and no question as to this contract was made on said reference. The assignee in bankruptcy, Winchester, as such assignee, contested upon said reference the amount of the fee. The complainants did not, by their action, in any way waive any rights they had in regard to said reference or sale.

The entry on the books of Heiskell, Scott and Heiskell strongly corroborates the witness-, Townsend, Spicer, and Staley. On same day of this entry and just preceeding it is an entry: Cr. Townsend by $50, amount paid on fees in this case of Jones *v.* Townsend, and

also entry charging Townsend $1.50 cash, paid costs for him in the case. The making of these entries doubtless called to his
372 mind the contract, and hence the entry of that date.

We cannot see why the referees attach such importance to the entry of a charge against Townsend of $500 as retainer *as retainer* fee on Sept. 23, '69. Every lawyer who keeps books knows that this is the common thing to do when the fee is not fixed—to charge a retainer and leave the ultimate compensation to be fixed at some future stage of the litigation. The answer was filed in Jones *vs.* Townsend on the 16th of Feb'y, 1869. (Dep. of C. W. Heiskell, Rec., p. 174–175.) The referees say that the entry of payment of $50 on Sept. 23, '69, recalled the contract to Scott's mind. This would give him a strange memory, for the proof is full that he talked with the partners about the fee they would get in this case as a large fee, and this did not suggest to his mind the contract. If anything could awaken his memory on the subject it would seem to be such conversations, and if inferences are to be drawn it
373 might be said with more force that the fact that such conversation did not recall to mind the contract strongly corroborates Scott's testimony that there was no contract to recollect.

The entry of $500 as a retainer cannot support the inference drawn from it, because it was a perfectly natural thing to do where no fee was fixed. The entry of a payment of $50.00 would naturally suggest that a charge should be made against Townsend upon which the $50 should be credited. Hence the charge of a retainer, which always implies a further charge unliquidated, to be calculated upon services rendered and results achieved. Scott in his deposition, Rec., p. 115, says during the progress of the cause he and Judge Carrick Heiskell had many conversations in regard to the fee they would get in this case if they gained it. He says: We both expected a magnificent fee.

The testimony of C. W. Heiskell is to the same effect. Rec., 154, 155; and J. B. Heiskell, Rec., 195 & 196, says $4,000 or $5,000
374 were the sums discussed as the amount the fee should be.

Both J. B. & C. W. Heiskell prove that it was the custom of the firm to discuss fees before they were fixed, and testify to the punctilious exactness of W. L. Scott in this regard.

Townsend says, Rec., 81 & 82, that in 1872 or 1873 the firm sent him a bill for $4,000. So the conversation between Scott and his partners, or some of them, must have occurred before this time. Naturally they would have taken place just at the time and just after the suit was instituted; yet the referees pass over all this without even a passing notice—pass over the fact that Scott could not have had these conversations without remembering the contract, if he had made one, and say that the entry of a credit of $50 on Sept. 23, '69, called it to his mind. If he remembered it, then where had he last mentioned it, and when did he recall it again? Was
375 this $50 entry the only trump that could awake his "drowsy powers?" If [he] had made the contract and forgotten it, there is nothing in the entry of $500 retainer fee to show that he recalled it. But an honest man could not have made such a con-

tract and have had these conversations with the other members of the firm without recalling it if it had passed out of his mind.

Scott says, Rec. 112: "I never did assent to any such proposition con-ciously. If I ever appeared to do so, then I did not apprehend its purport." He goes on to say he doesn't recollect any such conversation as Townsend, Spicer, and Staley refer to. If he did not understand any such contract, it is natural the conversation should make no impression upon his mind, even if there was such a conversation and he heard it. If he had understood that he agreed to such a contract he could not have escaped recollecting it when discussing the fee with his partners.

376 The testimony of the witnesses, Townsend, Spicer, and Staley, amounts to nothing without the proof that Scott understood the proposition and accepted it. Townsend says that he proposed to Judge Scott to give Heiskell, Scott and Heiskell $1,000 "if he would defend the suit and perfect the title to the land." That this was all that was said in regard to the contract, and that Judge Scott made no reply (Rec. 81), there is nothing in Townsend's testimony from which *from which* an acceptance of the proposition is to be inferred, except that Scott made no reply and went on and defended the suit. If he means to testify that Scott understood the proposition as set up in the bill, the only evidence he had of such understanding was that Scott said nothing. If Scott did not understand the proposition there was no contract. Let us put it as strongly as possible. Construe his testimony to be that Scott

377 understood him, and Townsend's deposition on this point may be summed up thus: I proposed to give Scott a contingent fee of $1,000 to perfect the title to the land. He understood and accepted it, because he made no reply.

Spicer says Townsend proposed to Judge Scott to give him $500 to undertake the suit and $500.00 more in the event of success, and that Judge Scott replied and accepted the proposition. Rec., 91–92. He is not very certain about his replying, and yet this is the only evidence he has of Scott's understanding the proposition.

Staley says that Judge Scott said he knew the title to the tract of land in controversy was good, and that he would attend to the suit and secure him the title to the land for a fee of $1,000. Rec., 95. This witness makes the proposition come from Scott to take the case; but, whether it came from Townsend or Scott, Staley is certain

378 that Scott understood the contract — talked about it fully.

Townsend assumes that Scott understood his proposition of $1,000, contingent fee, because he went out without saying anything.

Staley is positive that Judge Scott, if he did not make that proposition, accepted it and understood it, because Mr. Scott talked it over fully then and there with Townsend.

Spicer is not so sure that Judge Scott made any reply, but thinks he did, and from this assumes that he, Scott, understood a different proposition—that is, a fee of $500.00 anyway, and $500 in the event of success.

From the silence of Scott, Townsend implies the understanding of our proposition. From his replying to or originating the same

proposition Staley is assured that he understands it; while, from a somewhat uncertain recollection as to whether Scott replied or not,
Spicer assumes his understanding of an entirely different
379 proposition. No two of these witnesses agree as to what Judge
Scott did or said on that occasion. Can it be said that they establish the fact that he understood and accepted a proposition such as found by the referees? Which is entitled to the most weight on the issue as to whether Scott understood such a proposition, the testimony of these three witnesses, all differing as to what Scott did and said, and two of them assuming, rather than proving, his understanding of the proposition, or Scott's positive denial that he ever understood or thought of accepting such a proposition?

But this is not all. It is not at all improbable that Townsend, Spicer, and Staley might be mistaken in supposing that Scott understood the proposition. He could not have been mistaken as to whether he understood it or not; but his testimony, that he did not
understand any such proposition as agreed to, is supported
380 and corroborated by strong circumstances. Judge Scott, in
his deposition, says he had a conversation with Mr. Townsend in the office of Heiskell, Scott and Heiskell on the subject of the amount of this fee; that this conversation was a considerable time after the Jones bill was filed. "In this conversation the fee was spoken of as not having been agreed upon." Judge Scott set out this conversation fully and circumstantially. He remembers where he sat in the office and where Townsend sat. He proposed to adopt some percentage of the value of the land as a basis upon which to fix the fee. His partners were not in the office. He says: "Mr. Townsend did not agree that the fee might be fixed in that way, and he left the office with no agreement or understanding either as to what the fee should be or as to the basis on which it might be estimated, and he left with a wide difference existing in our respective estimates of what a reasonable fee
would be. We both understood the fee to be a matter
381 unfixed, and the whole conversation between us was on that
assumption. Rec., 117–120. Townsend is not recalled to rebut this positive testimony. It is not in any way disputed or denied. It must be taken as an uncontroverted fact in this record that Judge Scott had this conversation with Townsend after the suit was instituted. If Townsend had any reason before to suppose that Judge Scott understood and accepted a proposition of a $1,000.00, he must have been undeceived at this time. At the very least, it shows beyond a question that Judge Scott had not on any former occasion understood himself as agreeing to any fixed fee. This explains why he did not say anything to the other members of his firm about a contract for fees. He did not understand that he had made any such contract. In this connection let us recur to the testimony of the witnesses. Townsend was the principal, the client; he was the
one, according to this testimony, who proposed to give the
382 $1,000 contingent fee. He was talking to Scott. Spicer and
Staley were clerks in Townsend's office; they took no part in the conversation—neither spoke nor were spoken to. Which had

the best means of knowing whether Scott replied or not? Townsend says he made no reply. His testimony is worth more than that of Spicer and Staley on this point. Suppose it to be as Townsend said, that Judge —— went off without making any reply, and then take into consideration the conversation which Judge Scott says he and Townsend after this time had in the office of Heiskell, Scott and Heiskell, and the conclusion is inevitable that Judge Scott did not understandingly agree to attend to the suit for $1,000.00.

Judge Scott is also powerfully supported by the fact that when the bill for $4,000.00 was sent to Townsend in 1872 Mr. Townsend said nothing about an agreement to attend to the case for $1,000.00.
383 He refused to agree to the $4,000.00 fee. This is in exact accord with the conversation which Judge Scott proves between him and Townsend, in which they differed widely and failed to agree as to what the fee should be. It is, to say the least of it, extremely improbable that Townsend, supposing and believing that he had an express contract with Heiskell, Scott and Heiskell to attend to the case for $1,000.00, should receive a bill from them for $4,000.00 and call the attention of the firm to his claim of $1,000.00 contract in such emphatic and unmistakable terms as to make it impossible for all the members of said firm to swear, as in the record, that they never heard of any claim of such a contract until 1877, when the reference was pending.

It is utterly improbably that Scott would have agreed to attend to the case for $500.00 fixed and $500.00 conditional, or for $1,000.00.
The property was valued in 1869 at about $50,000.00, dep-
384 osition of D. H. Poston, Rec., 273; of W. P. Mitchell, Rec., 276; was estimated even as high as $60,000.00 by some parties to the suit. Deposition of Josiah Patterson, Rec., 293. Scott would not have undertaken a litigation in regard to property of such value for consideration so out of proportion to the amount in controversy. The referees not only find against Judge Scott's testimony, but, as between Townsend and Spicer, they find the contract according to Spicer's testimony, not according to Townsend's.

4th exception.

For brief on 4th exceptions defendants say that to have proceeded against Townsend to ascertain fee would have bound complainants. T. P. Winchester, the assignee in bankruptcy, stood for the purpose in the shoes of Townsend and completely represented him; had every right *and* Townsend, with some more. He was by the decree of the supreme court substituted in place of Townsend.

385 5th exception.

Every opportunity was given to the complainants to contest the reference. They knew that Winchester was defending, as the representative of Townsend, under the order of the supreme court investing him with the title and without any recognition of their right. But they were consulted by him and knew that he assumed to represent them. They had notice and knowledge in every way,

and the defendants were at great trouble to give them time to take proper steps. Certainly under such circumstances public policy demands that parties knowing of the pendency of the proceedings, in which they know the proceedings is intended to bind them, in which they know that others assume to represent them, shall not permit the court to make decrees without intervening at the earliest opportunity to prevent inef-ectual and useless litigation. A party who wilfully and knowingly lies by and permits such a case
386 to proceed ought to be held bound by the decree. Why should not a party be estopped from making a laughing stock of judicial proceedings and from lying by until the court and parties have acted on his supposed acquiescence and have incurred costs and expense on the faith of it, as much as a party who stands by, *in pais*, and allows another to expend money in the purchase of an estate?

6th exception.

This requires no brief.

7th, 8th, & 9th exceptions.

See brief on exception 5.

10th exception.

The law is well settled in Tennessee that a prior incumbrancer is not bound to *to* make a subsequent encumbrancer a party to his foreclosure proceedings. The rule is established—Mims *v.* Mims, 1 Hum., 425–430; Rowan *v.* Mercer, 10 Hum., 359–361.
387 It is a rule of practice on which titles depend, and it is therefore one from which the court would in no event depart.

The only idea on which it has been suggested that this case differs from the case cited is that they are mortgages for definite sums, while this is one in which the amount is to be ascertained. If the maker of two deeds of trust or mortgages is the only party necessary to a proceedings to ascertain the amount of present debt due on it, take an account of payment and strike out a balance, he would be equally sufficient to represent the ascertainment of an uncertain debt on a *qurantum meruit* or an account of advances secured beforehand by trust or mortgage.

The representation is the same in character in both cases. The thing to be done is the same, to ascertain a present debt; the simplicity or com*per*plexity of the account by which it is arrived
388 at is non-essential. It might be very simple to ascertain the amount which ought to be paid on an open debt or account, very complex to find a balance due on a fixed debt. Collusion is as much to be apprehended in one case as in the other, and the remedy is the same in each.

12-, 13-, & 14- exceptions depend on previous exceptions and reasons given for them.

15- exceptions.

This exception goes to the effect of the order of the supreme court by which the title to the property on the suggestion of the bankruptcy was vested in the assignee. That order to-day stands in the supreme court not in anywise attached as inadvertently entered. It was subject to be set aside in that court if it was erroniously made, but until that is done it is conclusive and cannot be made matter of collateral attack in a distinct proceeding. Defendants proceeded with Winchester on the faith of it. It
389 was matter of review if wrong. The trustee acquieseed in it; the parties acqu-esced. They perhaps had an option to stand upon their legal right to have the title declared in George Winchester, the trustee, but they could equally well make any question and protect all their rights under the assignee, T. P. Winchester. After doing the latter, a mode equally eligible, they will not be permitted to attack this decree collaterally when they ought to have done it directly and by motion or review.

16th exception.

This requires no brief.

HENRY CRAFT,
T. B. TURLEY,
Sol's for Def'ts.

(Endorsed:) 851. Shelby ch'y. T. P. Winchester, trustee, *v.* J. B. Heiskell *et al.* Defendants' exceptions & brief to referees' report. Filed April 23rd, 1884. Jno. W. Buford, cle-k, by Charles Conger, D. C.

390 In the Supreme Court of Tennessee.

T. P. WINCHESTER *et al.* *v.* J. B. HEISKELL *et al.* } No. —, C. D. Shelby Co.

Exceptions of the complainants to portions of the report of the commission of referees filed in this case.

1st. The complainants — to so much of said report as finds and reports to this hon. court that the defendants were entitled to an attorney's lien on the land in controversy, and that the declaration of the lien by the decree of the supren e court was binding on the complainants. That portion of the report is as follows: "As to the question whether defendants are entitled to a lien for their counsel fees, the supreme court has declared the lien, and we think very correctly and properly, and that question is settled by the supreme court in its decree of 8th December, 1876, and the declaration
391 of the lien by the supreme court is binding on the parties." The said commission of referees were in error in reporting—
1st. That the defendants were entitled to a lien for their counsel fees.

2nd. That the decree of the supreme court declaring that lien was binding on complainants.

3rd. That defendants are entitled to a balance of $770 without accounting for rents and profits of the land.

2nd. The complainants except to the following portion of said report, viz: "This proceeding in the chancery court on the reference as to amount of the fee, &c., is not such a matter in bankruptcy as is contemplated by sec. 711 of the Revised Statutes of the U. S. (1874), especially under the facts and circumstances of this case.

See 2nd Lea, 199, & 3 Lea, 296.

The said commission of referees were in error [in] holding and reporting that the proceeding in the chancery court of Shelby
392 county aforesaid was not "a matter of bankruptcy," within the meaning of the perview of sec. 711 of the Revised Statutes, and that that court has jurisdiction of the subject-matter. Under the provisions of sec. 711 of the Revised Statutes of U. S. the district court of the United States, as a court of bankruptcy, had exclusive jurisdiction of the subject-matter, and the said proceedings in the chancery court of Shelby county were *coram non judice* and void.

B. M. ESTES,
Att'y for Compl'ts.

In Supreme Court of Tennessee.

T. P. WINCHESTER *et al. v.* J. B. HEISKELL *et al.*

Brief of complainants accompanying their exceptions to the report of the commission of *of* referees in this case.

1st. Def'ts were not entitled to a lien on the land in controversy for their counsel fees in Jones *v.* Townsend. The services
393 rendered were in defence of the suit, and there was no actual recovery of land by a suit instituted for the purpose.

Transcript, pp. 10, &c., to 15, 50, &c.

Garner *v.* Garner, 1 Lea, 29.

The cross-bill was filed to stop waste and for other incidental purposes, and there was no actual recovery of land by the defendant Townsend.

Transcript, pp. —, &c.

A cross-bill is a mere mode of defence—a mere auxiliary suit.

2 Danl., pp. 1647–1653.

10 Yng., 213; 7 Lea, 662.

The doctrine of an attorney's lien on land recovered ought not to be extended.

It has it- root in Tennessee in Judge Nelson's opinion in Hunt *v.* McClanahan, 1 Head., 503, where the question was evidently not thoroughly investigated. It has been recognized by this court in Perkins *v.* Perkins, 9 Heiskell, 97; in Gaines *v.* Gaines, 1 Lea.

It seems that the doctrine has no existence elsewhere in
394 any court of England or in any State of this Union.
Humphrey *v.* Browning, 26 Ill.
Hargin *v.* Fowler, *Ctok*, 667.
Matches *v.* Harrington, 57 Miss., 208.
Smally *v.* Clark, 22 Vt., 598.

2nd. The decree of the supreme court declaring the lien seems to be understood not as an adjudication—that is, an estoppel—on the clients, but a mere declaration or statement to preserve a lien or as a basis for a suit.

Hunt *v.* McClanaghan, 1 Heisk., 51.
Perkins *v.* Perkins, 9 Heisk., 97.
Sharp *v.* Field, 5 Lea, 326.

Again the complainants in this suit can only be bound by the declaration of the lien on the ground that they were his *pendens* purchasers. They were such purchasers as to compl'ts in the suit of Jones *v.* Townsend, but not as to defendants or their counsel.

In Garner *v.* Garner (*supra*) Judge Cooper says: "But the
395 *lis pendens* is not notice to any one of the def'ts' rights, which stand precisely as if no suit were pending, and consequently a lien on that right without contract would be without any analogy to support it, besides being in conflict with our registration laws."

3rd. The second exception involves a Federal question. Sec. 711 of Revised Statutes of U. S. gives the Federal courts jurisdiction of matters and proceedings in bankruptcy "exclusive of the State courts," while the bankrupt law of 1867 gave them original jurisdiction. The proceedings in the chancery court to ascertain the amount of the fee and enforce it was a matter in bankruptcy, and that court had no jurisdiction of the subject-matter. Sec. 4972, Revised Statutes.

Bump on Bankruptcy (10 ed.), 211–3, &c., 316 & Case.
Lathrop *v.* Drake, 9 U. S. Rep., 517.
Wisswall *v.* Campbell, 93 U. S. Rep., 347.
Dissenting Opinion of Talcott, J., in 17 B. R., 90.
Claflin *v.* Houseman, 93 U. S. Rep., 130.
396–398 McHenry *v.* La Societe, &c., 95 U. S., 58.
Sherwood *v.* Burns, 58 Ind., 502.
Dodd *v.* Hammond, 59 Ga.
Cheek *v.* Anderson, 2 Lea, 199.
Barton *v.* Gider, 3 Lea, 296—

Are not decisions of the question in this case. The proceeding of def'ts to enforce their lien was a new adversary proceedings or new suit instituted after the adjudication and not a pending suit which the assignee might prosecute or defend under the bankrupt law, and its purpose was the ascertainment and liquidation of a lien on property in the custody of the bankrupt court and not a suit to recover the assets of the bankrupt, as in Barton *v.* Gider.

B. M. ESTES,
Sol. for Compl'ts.

(Endorsed:) 851 Shelby ch'y. T. P. Winchester *et al. v.* J. B. Heiskell *et al.* Exceptions to report of referees and brief. Filed April 15th, 1884. Jno. W. Buford, cl'k O. C., D. C.

399 *Opinion. Delivered* 1885.

T. P. WINCHESTER, Trustee, &c., *et al. v.* J. B. HEISKELL *et al.*

On the 6th day of June, 1866, one D. H. Townsend recovered a judgement in the circuit court of Shelby county against one W. E. Jones for the sum of $1,188.25, upon which execution was issued and levied upon the tracts of land now in controversy, containing about 640 acres, and then of the estimated value of about from $30,000.00 to $50,000.00.

On the 12th of Sept., 1866, said land was sold by the sheriff under said execution and levy, and bid off by said Townsend at the price of about $1,242.00. Jones died before the expiration of the two years allowed by law for the redemption of said land, and the time for redemption having expired, and said land not having been redeemed, Townsend took a sheriff's deed to himself therefor
400 on the — day of January, 1869. In the meantime dower in said land, comprising about 300 acres of this tract; and including the mansion house, &c., had been assigned to Mrs. Annie L. Jones, as widow of said W. E. Jones, who was in possession of the same, and said widow, the children, & heirs-at-law of said Jones also had some tenants in actual possession of some small portions of said land outside of the boundaries of said dower. Townsend took possession of all the residue of said lands outside of said widow's dower, and claimed to hold the same under his sheriff's deed. Thereupon, on the 16th of Feb'y, 1869, said Annie L. Jones, widow, and the children and heirs-at-law of said W. E. Jones, de'c'd, filed their bill in the chancery court against said Townsend, attacking the validity of said sheriff's deed on various grounds, and seeking to have the same removed as a cloud upon their title to recover the possession
401 of the portions of said lands so taken possession of by said Townsend, and also to be permitted to redeem the said land by paying the money and interest bid upon the same — said Townsand at said sale. To defend this suit Townsend either had, in anticipation of its being brought, or did immediately upon its institution, employ Messrs. Heiskell, Scott and Heiskell, *of* firm of lawyers then practicing in Memphis, to defend said suit and protect his title to said tract of land, and on the next day after said bill was filed, viz., on the 17th day of Feb'y, 1869, by said att'ys, file his answer and made the same a cross-bill, by which he denied all the allegations of said bill by which his sheriff's deed was attacked, setting up the same and the steps taken in acquiring it, and
402 averred that the same vested an indefeasible title in him, subject alone to said widow's right of dower, averring, further, that said complainants, by their tenants, had actual possession of certain portions of said land outside of the boundaries of the widow's dower, upon which they had built "shanties;" that said widow and heirs-at-law of said W. E. Jones were committing wast-s upon

said lands inside of the boundaries of said dower, and that their said tenants were committing waste outside of the same by cutting timber, &c., and seeking to enjoin said widow, heirs, and tenants, who were made parties resp't. to said cross-bill from committing any further waste upon any portion of said lands or taking any further possession or making enclosures upon the same, and
403 to have an account of the waste actually committed and a decree for the same against said parties for the same as would compensate him for the damages to the land and the value of the timber taken by them, and that by a decree of the court his title to said tract of land be declared and his possession quieted.

This cause was severely litigated in the chancery court until in 1872, when relief was decreed the complainants in the original bill, permitting them to redeem said land, and they having brought into court the am't of the redemption money, and Townsend having refused to receive it, the complainants had a decree investing them with the title to said land and awarding them a writ of pos-
404 session and dismissing Townsend's cross-bill, and he appealed to this court.

Pending said appeal in this court, to wit, on the 18th day of June, 1875, Townsend executed a deed of trust to George W. Winchester, as trustee, by which, among other things, he conveyed the tract of land in litigation to him to secure compl'ts May & Staley as her endorsers upon certain specified indebtedness to the other parties, as specified in said trust deed. On the 28th of Nov., 1875, Townsend filed his petition in bankruptcy and was duly declared a bankrupt, and complainant T. P. Winchester was duly appointed his assignee in bankruptcy.

On the 8th of Dec., 1876, said cause was tried in this court
405 and a decree rendered, by which the chancellor's decree was reversed and the complainants were adjudged not entitled to any relief, but relief was granted upon Townsend's cross-bill, as follows:

"It appearing that the said Townsend is entitled to the relief prayed in his cross-bill, to have his title declared and quieted, it is therefore adjudged that the said Townsend has a good title to the said tract of land and premises by virtue of his said purchase and sheriff's deed in fee-simple."

Said injunction was made perpetual, and the decree the- proceeds as follows:

"And it being suggested to the court that the title of said Townsend has been assigned to Thos. P. Winchester, his assignee in bankruptcy, it is, with the consent of said Townsend, by his coun-
406 sel, ordered that the said Winchester be made a party to this decree, and by consent this cause is remanded to the chancery court of Shelby county to take order in relation to the fund (paid in) and to take an account and make a report of the reasonable counsel fees of the counsel, Heiskell, Scott, and Heiskell, for which a lien is hereby declared on the premises in controversy, the said Winchester asking that said account be taken below."

Townsend, pending this litigation and before his bankruptcy, had

purchased said widow's dower interest in this land. The cause was remanded to the chancery court and an account taken upon very full proof as to the value of said services rendered by said
407 counsel in the case, said Winchester, the assignee in bankruptcy of said Townsend, appearing and cross-examining the witnesses introduced by said attorneys and introducing countervailing testimony. Townsend himself, while he knew about these proceedings, made no appearance, and even refused to testify in regard to said fees upon the application of his assignee in bankruptcy.

The master reported upon said reference that $5,500.00 was reasonable compensation to said solicitors for their services and that they had been paid $200.00—balance due, $5,300.00—which report, being unexcepted to, was confirmed and a decree rendered in favor of said attorneys for said amount, the same being decreed as
408 [a] lien upon said land, which was decreed to be sold for the satisfaction of the same, subject to the equity of redemption. Said land was sold, in obedience to said decree, on the 13th of Oct., 1877, and purchased by said solicitors at the price of $5,300.00, the amount of their said decree. The master's report of said sale, being unexcepted to, was confirmed, and the title divested out of the said Townsend or said Winchester, assignee in bankruptcy, and all parties, both complainants and respondents in said cause, and vested in Heiskell, Scott & Heiskell. Said assignee in bankruptcy acquiesced in said proceedings and sale and afterwards sold the equity of redemption, which was purchased by the compl't, the DeSoto Ins. Co. All parties permitted the time for redemption to expire without any attempt to redeem said land.

409 George W. Winchester, the trustee in the before-mentioned deed of trust, executed by Townsend on the 18th of June, 1875, having died without any attempt to execute said trust, T. P. Winchester was, by a decree of the chancery court, appointed trustee in his stead in 1879, who proceeded to sell all the other property conveyed in said trust deed, and on the 12th of Feb'y 1880, he, together with the beneficiaries mentioned in said deed of trust, filed this bill against said Heiskell, Scott & Heiskell, seeking to attack the title thus acquired by them to said land by virtue of said proceedings and decree, and to have the same declared void and removed as a cloud upon the title of said tenants and bene-
410 ficiaries under said deed of trust, upon the ground, as alleged, that said services were rendered in a defensive suit, and hence no lien existed in favor of said solicitors. 2nd. That neither said Townsend -or said complainants were made parties in any appropriate way to said proceedings, nor were there any appropriate proceedings under which said enquiry could be had, and, 3d, that so far as said assignee in bankruptcy was concerned his was a contingent interest under the trust deed, and this was the only right said assignee did or could represent in said suit, and that he did not even represent the equity of redemption in said property. The bill also alleges that there was a special contract existing between said sol's and Townsend, by which they had agreed to attend to said litigation
411 for $1,000.00. The answer denies all the allegations of the

bill upon which relief is sought specifically. The condition of the deed of trust is as follows: "Whereas Ben. May is bound for me as endorser upon the following-described notes and bills, to wit" (setting them out); "and whereas I am also indebted to said Ben. May in the further sum of $526.41, by note held by him," &c.; "and whereas, also, W. S. Staley became bound for me as my surety on an appeal bond," &c. (describing it, the am't being about $8,000), "and being desirous to indemnify and save harmless the said May and Staley from the liability thus incurred as surety and endorser, now if said parties shall be constrained to pay off and dis-
412 charge any of their liabilities and I shall fail to reimburse the amount thus paid within a period of two years from the date of these presents, then I authorize said trustee to sell," &c., &c., to raise money adequate for the payment and discharge of such liabilities. The trustee will apply the proceeds of this sale—1st, to the payment of the cost of execution of this trust; 2d, to the payment of these liabilities, or such as have accrued and fallen upon said indorser and surety, it being intended to place them both on an equal footing; and, lastly, pay the remainder to me, if any, &c. Said Townsend and said surety and endorser, Staley and May, are all utterly insolvent, and neither of them have ever paid any-
413 thing upon said indebtedness, and it is insisted by the resp'ts that this is a mere indemnity mortgage, and as said May and Staley have not paid any portion of said indebtedness and could not enforce the execution of the same for their own benefit, and consequently the holders of said indebtedness, upon which they are, respect*fully*, endorser and surety, can have no better right, and hence neither they nor the trustee can enforce the same for their benefit; that the condition of said mortgage has not been broken, and consequently this bill cannot be maintained.

Without entering into any discussion of this question, we are of opinion, as well from the terms of the mortgage itself, above
414 cited, as the fact that the mortgagor, Townsend, is insolvent, that the bill is maintainable by complainants to subject the mortgaged property—all else out of the way—to the satisfaction of their debts. 3 Heiskell, 525; 5 Cold., 392; Brandt on Suretyship, 383 *et seq.*

The next question presented is as to the lien of resp't and its superiority over that of the deed of trust in question.

Under our decissions as they existed up to that time there could have been no question as to the existence of the att'y's lien. Hunt *v.* McClannahan, 1 Heisk., 503; Perkins *v.* Perkins, 5 Heisk., 95; also *Ib.*, 694; 2 Baxt., 218; 12 Heisk., 472; 4 Bax., 93.

It is now, however, well settled that no att'y's lien exists for
415 services rendered merely in defending a suit by which lands are sought to be recovered from the clients. Garner *v.* Garner, 1 Lea, 30; Stanford *v.* Andrews, 12 Heisk., 664; Sharp *v.* Fields, 5 Lea, 326.

It is also well established that where the lien exists it relates to the commencement of the service. Garner *v.* Garner, *subpra*, 1 Heisk., 506; 3 Lea, 250.

It is insisted, however, for the complainants that the suit in which the lien was declared by this court was a purely defensive suit, and hence no lien existed and the adjudication of the same by this court was *coram non judice* and void. This question was raised in the case of Sharp *v.* Fields, 5 Lea, 329, where it was insisted that a writ of error could not be maintained for that reason, but it was held
416 that the party was entitled to prosecute the writ to reverse the judgment declaring the lien. It was said, however, that this would be so whether the judgment was void or merely erroneous, and the question was not there decided.

We are of opinion that the adjudication of the existance of the lien by this court under the state of pleadings in that case was not void, even if it were conceded to have been erroneous; but there was active relief in regard to the title to the land in question sought and obtained by the cross-bill and the decree thereon, as we have above seen, and if it were granted that the decree declaring the lien was erroneous it was at all events the law of that case. But it might be held, even under the present state of our decisions,
417 to have been correctly adjudicated. The lien of the respondents must consequently be now considered as valid and subsisting and related to the date of filing the answer and cross-bill, and was consequently superior to that created by the mortgage in question, which was executed several years afterwards and pending the litigation, which was consequently — notice to the complainants, and they were bound by the adjudications in that case.

The beneficiaries in said mortgage, being subsequent encumbrancers, were not necessary parties to the proceedings to enforce said prior lien. Brown *v.* Mercer, 10 Hum., 359; Mims *v.* Mims, 1 Hump, 425; 1 Daniel Ch. Pl. & Prac., 214.

418 Townsend having become bankrupt pending the suit in which the lien was declared, he was not a necessary or proper party to the proceeding to enforce it, and Winchester, the assignee, was the only necessary party. 1 Daniel Ch. Pl. & Prac., 215, and authorities there cited. And he having appeared both in this court and in the court below and assented to the order remanding the cause for the purpose of ascertaining the amount of the fee and its enforcement in said chancery court, and having voluntarily become a party to said proceedings and litigated the same in said court and acquiesced in the decision, cannot now be heard to question them.

But if this were not so, the assignee, being the only necessary
419 party to said proceeding, is the only one who could complain, which he has not done, but, as we have before seen, acquiesced and sold the equity of redemption; while, as we have seen, the beneficiaries in the deed of trust were not necessary parties or entitled to any notice of said proceedings. Yet the proof abundantly shows that in point of fact they had actual notice of them, and might, if they had chosen, become parties to the same, which they did not see proper to do. The record fully establishes that these respondents not only did not desire anything more than their just compensation for the services which they had rendered, but sought the

principal beneficiaries in said deed of trust, and afforded them
420 every facility, and were anxious that they should protect their interest by taking said property subject to their lien, which they declined to do. They were present at the sale, but refused to bid upon the property.

It is alleged by the bill that the respondents had a special contract with Townsend by which they had agreed to defend the title to the land for $1,000.00. This is positively denied, and the proof, in our judgment, fails to establish it. W. L. Scott was the partner of the firm with whom the contract of employment was made, whatever it was. He had procured the judgment for Townsend under which the land was sold, had superintended the proceedings under which the same was sold, had advised the
421 course to be pursued had prepared the sheriff's deed, had advised as to the possession, and was perfectly familiar with every step that was taken in the matter, and he testifies that he was engaged by Townsend soon after the sale, in the event the land should not be redeemed, to see to the perfecting his title and to defend the same in case of litigation. He further testifies that no such contract nor any specific contract was made with him, and that he never agreed to any such terms. Townsend and two other witnesses, who appear to have been his clerks—Spicer and Staley—have testified in relation to the matter. Townsend's testimony is that he pro-
422 posed to Judge Scott that he would give him $1,000.00 if he successfully defended the title to the land, and that Scott made no reply, but did attend to the suit. One of the clerks, who professed to have been present on the same occasion, testifies that Townsend proposed to Scott to give him a fee of $500.00 to defend said suit and a further conditional fee of $500.00 if he succeeded in perfecting the title to the land, and that Scott agreed to the proposition and accepted it in terms, while the other testifies that Townsend offered him $1,000.00, conditioned that he defended the title successfully, and that Scott agreed to accept the proposition. One of the witnesses says this was before, and the other that it was after the suit had been brought.

423 The circumstances all tend to corroborate the testimony of Judge Scott. The property, as we have seen, was then estimated to be worth in the neighborhood of from $30,000.00 to $50,000.00. The title was questionable and the suit of doubtful issue. It is scarcely probable that a firm of able lawyers would agree to undertake an almost purely speculative suit involving that amount for so small a proportion of the am't involved, conditioned upon the successful result of the same, while the client only risked the amount of about $1,242.00, and all above that sum would be a clear gain to him. The answer and cross-bill *was* filed on the next day after the filing of the bill. It is carefully and elaborately
424 drawn, and is such a presentation of the matters of defence and grounds of relief sought by the cross-bill as no att'y could investigate and prepare in one day unless he possessed an intimate knowledge of them in advance, and sustains the statement of Judge

Scott that he had been spoken to to defend the title in case of litigation, and had been preparing well for it.

Altho' Townsend testifies that he made a conditional contract with Scott to pay $1,000 in the event of the successful termination of the litigation, yet he further testifies that he paid $500.00 of said fee before it was terminated. On the books of Heiskell, Scott & Heiskell there appears a charge made by Scott of $590.00 as a
425 retainer in said cause, which was entered about six months after the bill was filed, and on the same day a credit upon said books to Townsend of $50.00 on account of said fee. This is the only charge in relation to said litigation upon said books, and which, we think, indicates that no specific am't had been fixed upon at that time as the fee to be charged in said case, else it would have been entered. Both of the other partners, J. B. & C. W. Heiskell, testify that, altho' they often conferred together with Judge Scott in relation to the am't of fees charged, *that* he never intimated to either of them that he had agreed upon any amount to be
426 charged in said cause, and all of them testify that they often spoke among themselves as to the amount of the fee they would be entitled to charge in that case in the event they were successful, and that they expected to charge a large fee in that event. And it certainly was a case that justified such expectations. It is also shown by the testimony of both Scott and Townsend, who was embarrassed with debts, and the resp't's it seems, became somewhat anxious to get security for their fee; that pending the litigation Scott drew up a mortgage for $4,000.00 and sent [it] to Townsend to sign by way of securing the fee in said cause, which both testify he declined to do because he considered the charge too high;
427 but Scott testifies positively that he did not, and he does not pretend that he did at that time claim that he had made any special contract as to the amount to be charged, which he would almost certainly have done if such had been the case; nor does he pretend that he even did in presence either of Scott or of either of the partners at any other time claim that a fee had been agreed upon. It is also shown by the testimony of the assignee in bankruptcy that while the litigation in the chancery court to ascertain the fee was in progress he went to Townsend and requested him to testify as a witness in regard to it, which he declined to do, as
428 he stated, for reasons satisfactory to himself. It is a legitimate inference that if he had at that time alleged that he had a special contract with the resp't for $1,000.00, conditional fee, said assignee would have had him subpœnaed, and compelled him to testify to that fact. These are some of the circumstances which we think disparage the testimony of said witnesses, and sustain that of Judge Scott as the true statement of the transaction. The amount of the fee, we think, rested upon a *quantum meruit*, and was properly ascertained and the lien properly enforced. The complainants stood by and saw the time for redemption expire without any effort to discharge said prior lien and appropriate the residue of the
429 property, which the- might have done. The result is the title of the respondents to the land in controversy has become

absolute and cannot be disturbed. The chancellor came to the same conclusion and dismissed the bill. The referees have reported that the decree should be reversed. The exceptions to the report must be sustained, and the chancellor's decree dismissing the bill affirmed with costs.

COOKE, *J.*

Opinion. 1886.

T. P. WINCHESTER *et al. v.* J. B. HEISKELL *et al.*

This cause was determined at the last term of this court
430 and a petition to rehear held over under advisement. The petition to rehear presents no question that was not fully considered on the former hearing, and upon a careful reconsideration of the questions then decided a majority of the court are satisfied that the original opinion was correct and adhere to it.

The petition to rehear will therefore be dismissed.

Judge Freeman dissents.

COOKE, *J.*

431 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State, for the western division thereof, at Jackson, on the first Monday of April, A. D. 1885—present, the Hon. Jas. W. Deaderick, chief justice, and Thos. J. Freeman, Wm. F. Cooper, J. B. Cooke, and Peter Turney, judges—to wit:

T. P. WINCHESTER, TR., *v.* J. B. HEISKELL *et al.* } No. 851. Shelby C. D.

SATURDAY, *May 30th*, 1885.

This cause was heard upon the transcript of the record from the chancery court of Shelby county, the report of the commission of referees, and the exceptions of defendants filed thereto, and it appearing to the court that the exceptions are well taken they
432 are sustained and said report set aside. And it further appearing to the court that there is no error in the decree of the court below; it is ordered, adjudged, and decreed that said decree be, and the same is, affirmed, and complainant's bill dismissed, and that he and the Hernando Insurance Company, T. H. Dunscomb, and Bank of West Tennessee pay the costs of this and the court below, for which let execution issue.

And on, to wit, Thursday June 11th, 1885:

T. P. WINCHESTER *et al.* *vs.* J. B. HEISKELL *et al.* } No. 851. Shelby C. D.

433 In this cause, the complainants having filed a petition for rehearing, by leave of the court extending the time, and the court not being able to consider the same at the present term, it is

held under advisement to the next term, until when the execution of the decree entered at the present term is suspended.

And the following appears of record, to wit:

T. P. WINCHESTER, Tr., *et al.* } No. 851. Shelby Ch'y Docket.
v.
J. B. HEISKELL *et al.* }

SATURDAY, *May* 1*st*, 1886.

The petition for rehearing heretofore filed in this cause by
434 complainants having been fully considered, and the court being of opinion that the opinion and decree pronounced herein at the last term of this court are correct, it is therefore ordered that said petition be refused and dismissed at petitioner's cost, for which execution may issue.

And the following appears of record, to wit:

T. P. WINCHESTER *et als.* } No. 851. Shelby Ch'y Docket.
v.
J. B. HEISKELL *et als.* }

FRIDAY, *June* 11, 1886.

The decree heretofore entered in this cause is modified as follows:
The court being of the opinion that this court had jurisdic-
435 tion in the case of Anna L. Jones *v.* D. H. Townsend, mentioned and set forth in the record to declare the attorneys' lien in favor of the defendants in this case on the tract of land described in the pleadings, and that the chancery court of Shelby county, Tenn., had jurisdiction to enforce said lien on said property by the proceedings, decrees, and sale, as shown in the record, notwithstanding the bankruptcy of D. H. Townsend and the bankrupt proceedings in the district court of the United States for the western district of Tenn., as shown in the record, and notwithstanding the provisions of the 711th section of the Revised Statutes of the United States, and notwithstanding the provisions of the sections of
436 said Revised Statutes embraced in title 61, "Bankruptcy," the court adjudges that the authority exercised by the State courts in said proceedings is not repugnant to the said laws of the United States. In construing said laws of the United States the court is of the opinion that under the circumstances of the case as shown by the record the said State courts had the jurisdiction to declare and enforce said liens on the land in question, and that under the said proceedings the defendants acquired a good and valid title to the land in controversy, and that the title is not and was not void and a cloud on the complainants' right and title, and the court doth so order and decree.

437 THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that the

foregoing is a true, perfect, and complete transcript in the case of T. P. Winchester, tr., *et al.* against J. B. Heiskell *et al.* as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office in the city of Jackson, on this the 2nd day of Oct., A. D. 1886, and of the Independence of the United States the 111th year.

[Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.]

JNO. W. BUFORD, *Clerk*,
By G. E. O'CONNOR, *D. C.*

Endorsed on cover: Tennessee supreme court. No. 1148. T. P. Winchester, trustee; W. L. Staley; E. B. McHenry, receiver of assets of Bank of West Tennessee; The Hernando Insurance Company, Ben. May; S. S. Jobe, administrator of S. M. Jobe, deceased; Taylor, Joy & Company, for use of W. F. Taylor, plaintiffs in error, *vs.* J. B. Heiskell, W. L. Scott, and C. W. Heiskell. Filed October 14, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

T. P. WINCHESTER & *al.*, Pl'ffs in Error,
vs.
J. B HEISKELL *et al.*
No. 1148.

Stipulation of Counsel and Addition to Record.

1 T. P. WINCHESTER *et al. v.* J. B. HEISKELL *et al.*

We agree that the within & the brief accompanying the same, which are hereto attached, may, to save the trouble of a certiorari & return thereto, be used on the hearing of this cause, either on motion to dismiss or other hearing, in the same manner, with the same effect, & subject to same exceptions as if included in the record certified by the clerk.

B. M. ESTES,
Sol. for Compl'ts.
HENRY CRAFT,
THOS. B. TURLEY,
For Def'd'ts.

2 *Brief of Complainants' Counsel on Petition for Rehearing.*

In Supreme Court of Tennessee.

T. P. WINCHESTER *et als. vs.* J. B. HEISKELL *et als.*

The pivotal point of the opinion of the court which sustains the title of the defendants is that the declaration of the attorney's lien by this court in 1876 was not absolutely void, but at most erroneous, and, because the lien relates to the commencement of the service, the complainants were *lis pendens* purchasers so far as the lien was concerned, and were, therefore, not necessary parties to the proceedings, and were bound by the decree. The leading authority cited to sustain the proposition that the lien relates to the commencement of the service, and that the defendants were consequently *lis pendens* purchasers, is Garner *v.* Garner, 1 Lea, 30, and in that case the doctrine is distinctly stated that "the *lis pendens* is no notice to any one of the defendants' rights, which stand precisely as if no suit were pending, and consequently a lien on that right, without contract, would be without any rule or analogy to support it, besides being

in conflict with the policy of our registration laws." Now, in
3 this case, Heiskell, Scott & Heiskell were defending the suit for the defendant in the suit. It is distinctly stated in Garner *v.* Garner that the lien "is sustained upon the ground that the *lis pendens* is notice to all the world of the plaintiffs' right, and no great harm can result from carving out of this right a lien in favor of the attorney, running *pari passu* with the lien of the *lis pendens*."

However the question might be between the attorneys and their clients, it is respectfully submitted that it is entirely different when the contest arises between the attorneys and purchasers of the property pending the suit. In order to bind the purchasers by the decree it must be shown that under legal principles they are *lis pendens* purchasers. That they are not in this case seems to be clearly settled by the opinion in Garner *v.* Garner. It was earnestly contended at the argument that the mere declaration of the lien was not an adjudication of the question of a lien, but simply afforded to the attorneys the ground for proceedings against the client, when, for the first time, an adversary relation to the client began.

The opinion of the court evidently misapprehends the reasons urged for this contention, for the learned judge says: "It is insisted, however, for the complainants that the suit in which the lien was declared by the court was a purely defensive suit, and hence no lien existed, and the adjudication of the same by this court was *coram non judice* and void."

Now, while it was insisted for the complainants that the declaration of the lien was *coram non judice* and void, it was done on
4 another branch of the case where the contention was urged that, under the Revised Statutes of the United States, the district court of the United States had exclusives jurisdiction of this "matter in bankruptcy," and for this reason the State courts had no jurisdiction of the subject-matter. Upon the point now under discussion the argument was that under the decisions of this court the mere declaration of the lien was not an adjudication at all, as already stated.

In Hunt *v.* McClanaghan, 1 Heisk., 503, the court say: "When the client is *sui juris*, and the amount of the fee is not fixed, the court should not do more than declare the lien and leave the attorney to enforce his claim, and notice must be given to the client." And "the lien may be preserved and notice thereof be extended by stating its existence in the judgment or decree."

In Perkins *v.* Perkins, 9 Heisk., 97, the court say: "When the client is *sui juris*, we think the court should, in the cause in which the services were rendered, do no more than declare the lien, and, if the amount be not settled between them by contract, leave the attorney to enforce his claims by an appropriate proceeding against his client," &c. See also authorities cited in original brief.

This declaration of lien is made without notice to the client and before the antagonistic relation begins, and under the authorities it is quite evident that when the suit or proceeding to establish or enforce the lien is begun, and the client is, for the first time, notified to defend, he may contest the validity of the lien, and the mere dec

laration of the lien in the main suit does not estop him as an adjudication to deny that any lien ever existed. To hold the client and his property bound by such a declaration without his day in court to contest the demand would be an infraction of his constitutional rights, and certainly the court never intended to establish such a precedent.

If then this declaration of the lien was not technically an adjudication, it cannot be held to be a *res judicata* estoppel on these purchasers. The effect of the declaration was to give the attorneys the ground upon which to assert and establish a lien, if one existed, by proper suit. No proper suit was ever instituted, and certainly, however much reason there may be for saying that Townsend or his assignee were concluded by the declaration of the lien, it cannot with propriety be said that these purchasers were bound, unless it is clearly an adjudication of the question.

It not being an adjudication, but a mere declaration of a lien, which constituted a basis for a suit against the client, an independent suit was necessary to enforce it, as settled by the authorities. It is conceded, as shown by the authorities cited in the opinion, that the complainants, as subsequent incumbrancers, were not necessary parties to this suit to enforce the lien, but they were proper parties, and as such were not concluded by the decree as to the validity of the lien.

Mims *v.* Mims, 1 Hump., 425, and Rowan *v.* Mercer, 10 Hump., 360, are the cases cited on this point in the opinion. In these cases it was simply held that the subsequent mortgagees were not necessary parties, or, in other words, that the failure to make them parties would not prevent the court from proceeding to a decree. They do not hold, however, that the decree would be binding on the junior mortgagees on all points. In the 10 Humphreys case, page 362, Judge Green quotes from Calvert as follows; "Secondly, that the decree of foreclosure is not conclusive against subsequent mortgagees who are absent, and that on proof of collusion they have been allowed to open the account." The clearly settled distinction between necessary and proper parties to a foreclosure suit is stated in section 1394 *et seq.* of Jones on Mortgages. While a junior incumbrancer is not a necessary party to a suit like this, still, if he is not made a party, who will deny that if the decree is taken on a void mortgage or for an excessive or unjust amount he may in the face of the decree allege the invalidity of the mortgage or the excess or injustice of the decree? Under the Tennessee authorities the decree against the mortgagor will bar the equity of redemption as against his assignee or a junior incumbrancer, but will not bind either as to questions or equities that they have the right to contest.

The conclusion of the opinion in Rowan *v.* Mercer, 10 Hump., 363, is: "We think, therefore, the subsequent incumbrancers are not necessary parties to a bill to foreclose a mortgage, and that if there has been no collusion between the parties, or other special ground of equity, the decree and sale are conclusive."

The illegality or invalidity of the mortgage would be "a special ground of equity" within the purview of this decision. The gist of

our contention, therefore, is that the mere declaration of the lien by this court in 1876 did not establish irrevocably a lien, was not an adjudication of the existence of a lien, but only afforded to the attorneys the ground for a suitable proceeding to establish
7 and enforce the lien. The distinction is between a mere declaration or stating of a lien in a decree without notice to the party to be affected thereby and a formal adjudication of a lien between parties properly before the court. In all subsequent proceedings in the first-mentioned case, the junior incumbrancers are proper parties and no adjudication of the lien or legal proceeding to enforce it could estop them to deny the validity of the lien.

2d. The commission of referees found upon the testimony of Townsend, Spicer, and Staley that defendant Scott made a special contract with Townsend to defend the Jones suit for one thousand dollars, five hundred to be paid absolutely and five hundred more if he succeeded in protecting the title. There is no testimony in opposition to this of these three witnesses except that of the defendant Scott. He is an interested witness, and the others have no interest in the suit. The opinion of this court finds, against the testimony of the three witnesses, that there was no special contract. Without again discussing this testimony we submit the following cogent consideration to the court.

The court correctly states: "On the books of Heiskell, Scott & Heiskell there appears a charge by Scott of five hundred dollars as a retainer in the said cause, which was entered about six months after the bill was filed, and on the same day a credit on the said books to Townsend of fifty dollars on account of said fee. This is the only charge in relation to said litigation on said books, and which we think indicates that no specific amount has been fixed upon," &c. To paraphrase this last clause of the opinion, the charge of a specific sum on the books indicates that no specific sum had been agreed upon.

8 Now, we submit, as the commission of referees found, that this entry shows that a specific amount had been agreed upon and that it strongly corroborates the testimony of the three witnesses. If no amount had been fixed, as defendant Scott testifies, what warrant had he for fixing five hundred dollars as a retainer. He does not pretend that any amount was agreed upon, and yet, in his own handwriting, on the books we find the specific amount of five hundred dollars charged as a retainer, which, according to the testimony of Spicer, was the amount of the unconditional fee agreed upon. Now, was it ever heard that the amount of a retainer fee was fixed by the attorney without agreement with the client? If there was no contract whatever why was this fee fixed at the specific amount of five hundred dollars, and yet why was there no other charge on these books? We submit that the commission of referees were right in reporting that this was a strong circumstance to sustain the testimony of the complainants' witnesses and that a specific fee was agreed upon.

3rd. Again one of the points earnestly pressed in oral argument and in our brief, which was vital to the case, has been entirely pre-

termitted and ignored in the opinion. The point was this: That, conceding for the argument that the declaration of the lien by this court established the lien of the attorneys, it is the settled doctrine of the court that when the reference to ascertain the amount of the fee was ordered a relation of antagonism between the attorneys and client was first assumed; that the attorneys were then required to institute proceedings to enforce their lien, which amounted
9 to a new suit for that purpose, and, because at that time Townsend had gone into bankruptcy, the chancery court of the State had no jurisdiction of the subject-matter of the suit, and the proceedings were *coram non judice*. Now, although the defendants did not institute a suit to enforce their supposed lien after the declaration of it by this court, still the subsequent proceedings by reference, etc., were tantamount, under the authorities, to a new suit. Then we have lienors instituting proceedings in a State court to enforce a lien on the property of a bankrupt pending the bankrupt proceedings. We insist that the district court of the United States had jurisdiction of this matter to the exclusion of the State courts by the express terms of the act of Congress. The authorities are full on the proposition that, from the filing of the petition in bankruptcy, all the assets and property are in the custody of the bankrupt court, and that "no court of an independent State jurisdiction can withdraw the property surrendered, or determine in any degree the manner of its disposition."

Bump. on Bankruptcy (10th Ed.), 316, and cases 210, &c.

While the original bankrupt law gave the Federal courts original (not exclusive) jurisdiction of 'matters and proceedings in bankruptcy," the Revised Statutes, for the first time, gives them exclusive jurisdiction, and declares that it shall be exclusive of the State courts of the several States. Sec. 711 of the Revised Statutes of the United States provides "the jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several States: 1st, of all crimes and offenses cognizable under the laws of the United States: 2nd, of all suits for penalties or
10 forfeitures incurred under the laws of the United States; 3rd, of all civil causes of admiralty and maritime jurisdiction; * * * 6th, of all matters and proceedings in bankruptcy; * * * 8th, of suits and proceedings against ambassadors," &c. It is not necessary to argue from this that a State court has, since the Revised Statutes, as much right of jurisdiction over "crimes and offenses cognizable under the laws of the United States," or over "penalties and forfeitures incurred under the laws of the United States," or over "suits and proceedings against ambassadors," &c., as they have over "matters and proceedings in bankruptcy." They are all in the same category, and in each the jurisdiction of the State courts is imperatively excluded. What would be said of a judgment of a State court in the case of a "crime cognizable under the laws of the United States," or in a suit against an ambassador, &c.?

But that Congress intended by this section to give exclusive juris-

diction of "all matters and proceedings in bankruptcy" to the Federal courts cannot be seriously denied. The chief contention is that this was not a "'matter' in bankruptcy." Of course it was not a "proceeding" in bankruptcy, but we insist that it was a "matter" in bankruptcy.

Sec. 4972 of the Revised Statutes gives a general designation of matters and proceedings in bankruptcy, and, amonst others, "the ascertainment and liquidation of the liens and other specific claims" on the assets of the bankrupt, "the adjustment of the various priorities, and conflicting interests of all parties," and "the marshalling and disposition of the different funds and assets, so as to secure
11 the rights of all parties, and due distribution of the assets amongst all the creditors."

This is not a case like the large majority of those in the authorities cited of a suit by an assignee to collect or recover assets, but a proceeding in a State court by a lienor claiming a lien on property in the custody of the bankrupt court.

To tolerate such a proceeding would be subversive of the jurisdiction of the bankrupt court and destroy the objects of the bankrupt law.

This is clearly within the 4972 section of the Revised Statutes. Heiskell, Scott & Heiskell claimed a lien on the bankrupt's property. How is their lien to be "ascertained" and "liquidated" within the meaning of that section? How are the conflicting interests of all parties to be adjusted, and how are the assets, including this land, to be marshalled? Certainly by the very terms of the section in the district court.

Not only therefore was the "ascertainment and liquidation" of this lien a matter in bankruptcy within the plain meaning of the statute, but it is so under the authorities.

In Lathrop *v.* Drake, 91 U. S., 517, the Supreme Court of the United States plainly define these matters and proceedings in bankruptcy. The court say: "Of this there are two distinct classes; first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy, instituted by the petition and ending in the distribution of assets amongst the creditors, and the discharge or the refusal of a discharge to the bankrupt; secondly, jurisdiction as an ordi-
12 nary court of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or claims alleged to be due from or to him. The language conferring this jurisdiction is very broad and general. It is that they shall have original (now exclusive) jurisdiction in their respective districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified, resulting, however, in the two general classes above mentioned," etc. Here it is settled that this was a matter in bankruptcy. The distinction between "matter" and "proceedings" must be borne in mind. One designates one of the classes, and the other the other class.

In harmony with this decision the Supreme Court in Wiswall *v.* Campbell, 93 U. S., 347, held that a suit brought by an assignee against any person claiming an adverse interest, etc., was "no part

of the bankrupt proceeding," with reference to the question of appeal to the Supreme Court. It was not held in conflict with Lathrop *v.* Drake that it was not a matter in bankruptcy. The court does not intimate a dissent from its former opinion, nor is there the slightest conflict. The dissenting opinion of Talcott, J., in 17 B. Reg., 90, etc., cites and discusses the case of Lathrop *v.* Drake, and is a cogent and almost decisive authority upon the question at bar.

This court in Cheek *v.* Anderson, 2 Lea, 199; Barton *v.* Geiler, 3 Lea, 296, has held that under the Revised Statutes a State court has jurisdiction of a suit by an assignee to recover bankrupt assets. Outside of Tennessee the authorities are in conflict on the question, as shown below. But the question here is quite different; it
13 is whether a lienor on bankrupt property *in custodia legis* in the bankrupt court can enforce his lien on the property in a State court.

The intimation of the Supreme Court of United States in Claflin *v.* Houseman, 93 U. S., 130, and McHenry *v.* La Societe, etc., 95 U. S., 58, are quite strong against the jurisdiction of the State courts under the Revised Statutes. In the first-named case the opinion concludes: "Without discussing the subject further it is sufficient to say that we hold that the assignee in bankruptcy under the bankrupt act of 1867, as it stood before the revision, had authority to bring a suit in the State courts," etc.

In Sherwood *v.* Burns, 58 Ind., 502, and Dodd *v.* Hammock, 59 Georgia, the question is directly adjudicated against the jurisdiction of a suit by the assignee to recover assets in a State court.

So Hallet, district judge, in 17 B. Reg., 293.

Frost *v.* Hotchkiss, 14 B. Reg., 443, the New York Supreme Court.

Alcott *v.* McLean, 16 B. Reg., 79.

The opinion of the majority of the court, in 17 B. Reg., 90, is in favor of the jurisdiction of the suit of the assignee, but is not cogent or satisfactory.

Dover *v.* Lumpkin, 57 Miss., 523, is not an authority entitled to much weight.

We submit that the act itself, the definitions in Lathrop *v.* Drake, and the dissenting opinion of Talcott, judge (*supra*), clearly exclude the jurisdiction of the State courts in a case like this.

14 Whatever may be said in reviewing the authorities upon the question of the jurisdiction of a State court of the suit of the assignee to recover bankrupt assets it has never been held by any court since the Revised Statutes, so far as we have discovered, that a State court had jurisdiction to entertain a suit in favor of a mortgagee to foreclose a mortgage or a lienor to enforce a lien on the bankrupt property. Section 5075 of the Revised Statutes provides the mortgagee's remedy, and the scope, spirit, and letter of the bankrupt law forbid the proceeding taken in this case.

It will not do to attempt to avoid this by claiming that the assignee has, by equivocal acts, waived the objection or consented to the jurisdiction of the State court, for it is well settled that juris-

diction of the subject-matter cannot be conferred by waiver or consent.

1 Hump., 332; 9 Yerg., 30, 597.

The complainants have an interest in this land, which, under the opinion, entitles them to file this bill to remove a cloud, and if the defendants claim title under a decree of the State court that had no jurisdiction of the subject-matter, then their title is a nullity, and this court must so pronounce.

It is said that the bill does not attack defendants' title on this specific ground. This is true; but it does attack it as a cloud on title and a nullity, and contains a prayer for general relief. Under this prayer the complainants have a clear right to a decree removing the cloud upon the case made by the proof, although the particular ground is not set forth in the bill.

2 Atkins, 141; 8 Baxter, 356; 4 Heisk., 609; 4 Sneed, 624; 5 Sneed, 546.

15 The court should, at all events, decide this Federal question; and, if the decision is adverse to the complainants, should, by an amended decree, declare that the question was made and that the decision was adverse to the complainants, in order that they may be enabled to prosecute a writ of error to the Supreme Court of the United States.

The great injustice of permitting attorneys to obtain for their services in defending valuable property not only several hundred dollars in money, but the entire property itself, will move the court to lend a willing ear to the considerations pressed in this brief.

We earnestly pray for a rehearing.

B. M. ESTES,
For Petitioners.

16 In the Supreme Court of Tennessee. Shelby C. D.

T. P. WINCHESTER *et al.*
v.
J. B. HEISKELL *et al.* } 851.

To the Honorable James W. Deaderich, chief justice, and the associate justices of the supreme court of Tennessee:

The complainants in this cause respectfully petition the court to grant a rehearing of the case, and refer to the accompanying brief for a statement of the special matter or cause on which a rehearing is applied for. As in duty bound they will ever pray.

ESTES & ELLETT,
Sol's for Petitioners.

THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the petition for rehearing in the case of T. P. Winchester against J. B. Heiskell *et al.*, as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, on this the 29th day of June, A. D. 1886, and of the Independence of the United States the 110th year.

[Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.]

JNO. W. BUFORD, *Clerk*,
By ——— ———, *D. C.*

17 [Endorsed:] T. P. Winchester *et al. vs.* J. B. Heiskell *et al.* Copy of petition to rehear. Fee, 65c.

[Endorsed:] Sup. court U. S. 1886, Oct. term. T. P. Winchester & *al.*, pl'ffs in error, *vs.* J. B. Heiskell *et al.* Stipulation of counsel & addition to record.

[Stamped:] Office Supreme Court U. S. Filed Nov. 9, 1886. James H. McKenney, clerk.

120-278

Supreme Court of the United States

OCTOBER TERM, 1886.

T. P. WINCHESTER ET AL.

1148 vs. } **MOTION TO DISMISS AND AFFIRM.**

J. B. HEISKELL ET AL.

BRIEF OF RESPONDENTS.

CRAFT, TURLEY & HUMES,

Attorneys for Heiskell, Scott & Heiskell.

S. C. TOOF & CO. PRS. & LITHS., MEMPHIS

BRIEF

On Motion to Dismiss and to Affirm.

T. P. WINCHESTER ET AL.

1148 vs.

HEISKELL, SCOTT & HEISKELL.

Defendants were counsel for D. H. Townsend in a land case in which they were successful. The Supreme Court of Tennessee declared a lien on the land in their favor for fees (f. 416 et seq., R. 111). Pending the suit, Townsend had conveyed theland in trust to secure debts (f. 404, R. 108; f. 29 et seq., R. 12 et seq.;) of complainants and others and had become bankrupt (f. 404, R. 108). His assignee claimed the benefit of the decree, and the Supreme Court vested the title to the land in him (f. 340, R. 89; f. 406, R. 108–9) as assignee. He asked the court to remand the cause to the chancery court at Memphis, to ascertain the amount of the fee, and the order was made (f. 406, R. 108–9). Thereupon the defendants proceeded to take proof, and obtained an order, fixing the amount, and to sell the land for their fees. This order was obtained with the assignee appearing and contesting, and with full notice to the beneficiaries in the deed of trust (f. 606–7, R. 109). The assignee had agreed with them that they should look to the land and lien for fees (f. 133, R. 37; f. 205, R. 55). The trustee, George Winchester, was the father and law partner of T. P. Winchester, the assignee, who on his

death was appointed trustee, and in that capacity joins in this suit. The land was sold, the counsel for the beneficiaries, with some of the beneficiaries in the deed of trust, came to the place of sale, found that the sale was made subject to a statutory right of redemption for two years, and declined to remain or bid (f. 186–7, R. 50–51). The defendants bid their debt and the land was struck off to them (f. 187–8, R. 51) and the sale confirmed (f. 260, R. 69). One of the beneficiaries subsequently, at a sale made by the assignee, bought the right of redemption (f. 254, R. 67; f. 256–262, R. 68–9), and this was reported to the District Court in Bankruptcy and approved. Later a contest was made between the assignee and the purchasers as to the rents for the year (f. 258–262, R. 68–9), and the courts gave a pro rata to the assignee, though the whole rent fell due after the confirmation of the sale by the chancery court. The purchaser of the right of redemption and other beneficiaries failed to redeem, though repeatedly urged by the defendants to do so (Dep. B. M. Estes, f. 248–9, R. 66; f. 163, R. 44; even after redemption expired, f. 166, R. 45).

The beneficiaries then joining the trustee, filed this bill to set aside the sale to defendants, insisting that the Supreme Court of Tennessee erred in declaring the lien (f. 22, R. 10), and that the proceeding in the chancery court was not binding on them because they were not made parties to the inquiry (f. 22–3, R. 10), and because the assignee had no interest and did not represent them (f. 22, R. 9; f. 24, R. 11), insisting that defendants got the whole fruits of the litigation for their services in the prosecution of the case. (f. 19, R. 9.)

No attack was made upon the decree on the ground that the jurisdiction was exclusive in the Bankruptcy Court. On

the contrary, the bill is framed with an express denial of any interest in the assignee in bankruptcy (f. 23, R. 10; f. 24, R. 11). The beneficiaries are not creditors in bankruptcy, and Winchester does not sue as assignee, but alone as trustee, and neither the assignee or any creditor in bankruptcy is claiming here (f. 255, p. 67).

When the case came to be heard, after decree in chancery and appeal in Supreme Court, before referees appointed by statute to report the facts and law to the Supreme Court, exception was taken that the Referees erred in reporting that the chancery court had jurisdiction, because the district court had exclusive jurisdiction (f. 35, 2 R. 92; f. 392, R. 105). *This is the first appearance of this question in the record.* As to Act establishing Supreme Court See Session Acts 1883. C. 257. p. 342

The Supreme Court afterward heard the cause, and the opinion shows that they took no notice of this question, but decided that the sale was valid and defendants' title good. (f. 429, R. 113–114.)

Complainants filed a petition to rehear, in which they state that the court had not decided that question, and ask the court then to decide it, that they might have the case reviewed here. The court dismissed the petition to rehear (f. 434, R. 115). Complainants' counsel then asked the court to order that a statement be inserted in the decree that the point was made and held against him, and the court so ordered. (f. 435–6, R. 115.)

On this state of facts, is a federal question so made as to confer jurisdiction of this writ of error?

MOTION TO DISMISS.

In this case the record shows that the original decision by the Supreme Court of Tennessee did not involve or determine this question. The brief of complainants' counsel on rehearing shows this most distinctly. See Sup. R. p. 4-7. "The court should at all events *decide* this *Federal* question, and if the decision is adverse to complainants, should by amended decree declare that the question was made and that the decision was adverse, etc." So, it appears that decision was not made when the decree was entered, but decided first on petition for rehearing, which does not give the jurisdiction.

Poydras v. Louisana, 18 How. 192.

FEDERAL QUESTION.

In the consideration of this case it becomes material to determine how the matter of a conflict between a State law and an act of Congress is to be drawn in question. Is it sufficient that the State court decide a Federal question when the question is not made in the pleadings, but the case is put upon grounds inconsistent with the claim on which the decision is unnecessarily made? Our contention is that it is not.

To illustrate the point, suppose the question which the State court say they decided was upon a clause in the treaty with France ceding the Louisiana Territory, and the suit was upon a bill for goods sold in New York in 1880. It is impossible that the court would take jurisdiction on a decision of a matter not drawn in question within the meaning of the act. Now this illustration is chosen because it is impossible in the nature of things that the

question could have any relevancy to the matter in issue, and thence it results that it clearly appears that though decided, no such matter was drawn in question. But degrees of clearness in proof are not regarded as affecting the efficacy of facts to produce results. A state of facts proved by a mere preponderance of evidence is of equal potency to produce legal consequences, with facts established by proofs of the most irresistible cogency. If the most clear evidence of irrelevancy will defeat the attaching of jurisdiction, then it is established that irrelevancy is fatal; and if irrelevancy is fatal, then it matters not how it shall be shown, whether by the clearest proof or the most delicately preponderant weight of evidence.

This seems to be clearly the view of this court in Lawler v. Walker, 14 How. 150–154, where they quote from Commercial Bank v. Buckingham, 5 How. 317: "It is not enough that the record shows that the plaintiff contended and claimed that the judgment of the court impaired the obligation of a contract and violated the Constitution of the United States, and that this claim was overruled by the court, but it must appear by clear and necessary intendment from the record that the question must have been raised, and must have been decided in order to induce the judgment."

In the principal case the court say, "the construction (of a State statute) does not violate a constitutional point under the twenty-fifth section of the judiciary statute so as to give this court jurisdiction of this cause."

"If more was wanting in aid of our conclusion, it is to be found in the pleadings in the case, in the evidence given on the trial, the objections made to the admissibility of cer-

tain parts of it, in the prayers of the defendant to the court to instruct the jury, and in the charge which the court gave. By no one of them is a constitutional point raised. It was only suggested in argument. and on that account it was that the court certified that the validity of statutes of Ohio was drawn in question, which were said to be in violation of the Constitution of the United States, and not because the court considered that such a point had been rightly raised before it under the 25th section of the judiciary act of 1789."

See also Adams Co. v. Burlington & M. R. R. Co., 112 U. S. 123, 129.

In the case of Parmelee v. Lawrence, 11 Wal. 36–39, the court say: "Neither in the pleadings, nor in the evidence, "nor at the hearing in the Supreme Court, was any ques- "tion made as to the validity of any statute of the State, "on the ground of its repugnancy to the Constitution of "the United States. This question was first made before "the Supreme Court on appeal. The certificate of the "presiding judge shows that the objection was taken in "the argument there and overruled, and furnishes the only "evidence that any Federal question was raised in the "case." Then quoting from Lawler v. Walker: "It must "appear in the pleadings or from the evidence * * * in "the instructions asked for, or from exceptions taken to "the rulings of the court. It must be that such question "was *necessarily* involved in the decision, and that the "State court would not have given a judgment without "deciding it." This case cites also R. R. Co. v. Rock.

The case of R. R. Co. v. Rock, 4 Wal. 177–181, cites the case of Lawler v. Walker, and quotes from it what is above

quoted, after first giving the decision of the court in other words, as follows: "We are unable to discover that either the validity of the Constitution of Ohio, or the clauses of the Constitution of the United States, mentioned in the certificate, are involved in that record or were decided by the court. It is probable that counsel in the argument * * insisted that these matters were involved, and that the chief justice felt bound to certify when requested that they were drawn in question. But if the record does not show that they were *necessarily* drawn in question, this court cannot take jurisdiction to reverse the decision of the highest court of a State upon the ground that counsel brought them in question in argument."

In Medberry v. Ohio, 24 How. 413, 415, this court says: "It is not averred in the pleadings, or anywhere on the record, that this or any statute of Ohio was void because it impaired the obligation of contracts."

It is true, there, that no decision appears to have been made on that question, but in the case at bar no decision was made on this Federal question until after the petition to rehear.

In Warfield v. Chaffe, 1 Otto 690, 692, this court, as part of the argument to show that no question arose as to the necessity of stamps to the validity of a contract, says, defendant "insisted (in answer) that there were not any revenue stamps on the note when it went into the hands of the plaintiffs, and that they had no authority to put stamps upon it. She thus, by the pleadings, tendered an issue of fact." We may add, not of law, whether the want of a stamp made the act void.

In the case at bar, the fact of bankruptcy is stated only

to found upon it a denial that it gave the assignee any title, and it is like the case above cited would be, if, after stating the want of stamps, the pleading had gone on to assert that the note was nevertheless binding on the respondent.

In the Warfield case again the question does not appear to have been decided, and the opinion showed that it was not.

In Brown v. Atwell, 2 Otto 327, 330, this court say, to give jurisdiction: "It must appear that the decision *was necessary* to the determination of the cause, and that it was actually decided."—Waite, C. J. See, also, Choteau v. Gibson, 111 U. S. 200, which is express and clear.

Caperton v. Boyer, 14 Wal. 216, 237, holds that a certificate of the judge is not conclusive that the question *was raised*, and so is a conclusive authority that both must appear. "Unless both those things appear, that is, unless "it appears that the question was raised, and that it was "decided in the way required, the jurisdiction does not "attach."

In the case following—same book, p. 238, Caperton v. Ballard, 14 Wal. 238—the question was on the effect of a record from another State, and because it appeared that the certificate was not in conformity to the act of Congress, the court held that the want of such conformity precluded the plaintiff from the question. They also held, that the court below had not decided the Federal question. If they had, however, as it was not made, it would not have availed.

In Maxwell v. Newbold, 18 How. 511, 517: "It must appear that one of the questions stated in the 25th section

of the act of 1789, *did arise* and was decided." The questions decided in the trial court, "make no reference whatever to the Constitution and laws of the United States." "Undoubtedly this did not preclude raising the question "in the Supreme Court, if it was involved in the case as "presented to that court." It must have been "involved" —presented in the pleadings—so as to be available there. If the court, under a mistake as to the pleadings, decided it, or, as a mere matter to show their learning, decided it when it was not involved—not raised in allegation and proof—then, though presented, argued and decided, it would not give this court jurisdiction. So if, upon the pleadings, the real question at issue was a matter purely of State law; or, if the complainant by his pleading has plainly put his case on the State law, or if the Supreme Court decided the case at bar without deciding this question.

See petition for rehearing and last sentence but one in brief. (Sup. Rec. p. 8).

In Daniels v. Tearney, 12 Otto 415, 422, the court refer to the plea of appellant, and deduce from it that the facts were stated to raise the question, and that the defendant did rely upon the nullity of the State statute, and they say "this implies that the defendants claimed that the bond taken under it was void, and that they had a right to * * exemption from liability under it,"—the bond.

"It thus appears that there was drawn in question, the authority of the sheriff exercised under a law of the State in taking the bond, and that the decision was in favor of the validity of that authority."

This presents the question whether this is matter simply to be drawn in question, or to be set up and specially claimed.

Our case is the converse. In it the right of the complainants to exemption from the effects of the decree of the chancery court to sell for the defendants' lien because in violation of the statute giving exclusive jurisdiction to the district court in matters in bankruptcy, is not set up or claimed; but, on the contrary, the bill relies upon the State law and the violation of it, for the right to be exempt from the operation of that decree, and not at all on the exclusive jurisdiction of the district court, which it does not assert or allude to, until the case is in the Supreme Court of the State, and it is too late for respondents to show by answer that the district court did take action, authorizing the action of the State court, or ratify and adopt its act. Then by exception to the action of referees, who were to report the contents of the record and recommend a decree, the question was first made. As to office of referees, see Lea's Rep. (Tenn.)

The record does show that some of complainants, after the sale to the defendants, bought at a public sale made by the assignee, the right of redemption under that sale, which was reported to the district court and ratified. This shows that the district court did take jurisdiction, but as there was no issue presented to the respondents in the bill, the record in bankruptcy is not presented in this record and this court cannot know what it would disclose beyond that fact.

The case of Udell v. Davidson, 7 How. 771, is similar in principle to Daniels v. Tearney, but need not be stated at large.

In State of Louisiana *ex rel.* v. New Orleans, 108 U. S. 568, 570, where the complainant had rights under the Con-

stitution of the United States, the court say no right to any specific rate of taxation has been denied—no such relief being claimed in the pleadings—and the court hold that there is no jurisdiction.

The case of Worthy v. Barrett, 9 Wal. 611, 613, holds that the court has no jurisdiction where a State board of commissioners refused the bond of an officer on the ground that he was disqualified by the Constitution of the United States, and no right was set up by him under any provision of the Constitution.

In the case at bar, the record shows that no such question was raised by the pleading—no such point made by the bill or met by the answer. The bill, on the contrary, denies that the assignee in bankruptcy had any interest or right in the property, or that he represented anything, and they put the case upon the ground that the declaration of lien by the State Supreme Court was void, as in violation of State law and their own line of decisions, and that the decree of the chancery court under which the amount was ascertained and the sale was made, was void as to them, because they were not parties to it, and because the assignee in bankruptcy represented no interest or scintilla of title in the cause—thus clearly putting the case on grounds inconsistent with the idea that they relied upon the exclusive jurisdiction of the district court in matters of bankruptcy.

Though the Supreme Court say that they did decide the question, they evidently say it in the same sense that the chief justice of the Supreme Court of Ohio certified the same in the case of Lawler v. Walker; that they had decided the point, though no such point was 'rightly raised.'

Such certificate or judgment does not, where it appears as here that it was not involved in the case as made and presented by the bill, make a case within the judiciary act. It is not enough that the question was decided, if it did not arise. It was not enough that it arose, if it was not decided—both must exist in the case.

Crowell v. Randell, 10 Pet. 368.

Bank v. Buckingham, 5 How. 341.

The fourth resolution in Armstrong v. The Treasurer, 16 How. 285, maintains this view: "Where the record shows that such a point may have arisen and been decided —that it was in fact raised and decided"—must appear by the record.

In Smith v. Adset, 16 Wal. 185, 190, the court cite Rector v. Ashley, 6 Wal. 142, for the proposition, that "if the judgment of the State court *can* be sustained on other grounds than those which are of Federal cognizance, this court will not revise it, although a Federal question may also have been decided therein and decided erroneously."

In the present case, nothing appears to show that the court did not hold that the form of the pleading precluded the attack now made, though the court also held on rehearing, that if made, the objection would not avail.

The opinion of the court shows, that the question was not made in the pleadings; on this point it states the question presented by the bill thus: "So far as said assignee in bankruptcy was concerned, his was a contingent interest under the trust deed, and this was the only right said assignee did or could represent by said suit, and that he did not even represent the equity of redemption in said property." (f. 410, R. 109.)

In Maney v. Porter, 4 How. 55, where the jurisdiction was claimed because the contracts of certain Indians in Tennessee were authorized by the State law, and the authority exercised under those laws were repugnant to the treaty of 1830 and to the laws of the United States, the court say: "It is evident the suit is not brought to uphold any right or title which the complainant claimed under the Choctaw treaty or under the laws of Congress, which he states to have been passed upon the subject. * * He does not * * aver that these claims are valid or that he has title to them, but on the contrary, charges that none of the claims had been secured. * * We have no right to review unless the complainant claimed some right under the treaty * * or act of Congress. * * In the case before us no such title, right or privilege was claimed by the bill, and of course no decision was made against it." Here no such decision was necessary or proper, and if made was not applicable to the case. The case was, in fact, decided without deciding that point, and it was only decided upon an appeal by the complainant to the Supreme Court to decide that he might have the case reviewed here. See petition, and brief made part of it. If this be allowed, there is no case decided by a State Supreme Court which may not be brought to this court, if counsel can get the State court to say a Federal question was decided, and this, though the case was decided outside of any Federal question.

PARTIES TO AN ATTACK ON DECREE.

Complainants are not the proper parties to attack this decree.

There are many cases in which a party is precluded from making a question which another could make.

In Mays v. Fritton, 20 Wal. 414, the question was as to the effect of a bankrupt proceeding on a case in the State court, and the court say of the assignee: "It is not competent to a party to assent to a proceeding in the court below, take his chances of success, and upon failure come here and object that the court had no authority to take the proceeding. We are not called upon to decide whether the State court was competent to proceed to distribution; or whether, if the demand had been made, the whole subject should have been remitted to the United States Court."

This was decided after the last act cited as embodied in the Revised Statutes, 1870, and the assignee submitted to the jurisdiction of State courts after the act of March, 1867, the only other act cited.

Scott v. Kelly, 27 Wal. 57–60: Assignee having submitted to State court, cannot dispute their action.

Here the party in interest, the party to the suit, the assignee, may have had the right to say this case ought to have gone to the Bankrupt Court. Suppose he was here as assignee seeking to do that thing, this court would repel him as it repelled the assignee in the cases of Mays v. Fritton and Scott v. Kelly.

He would also be barred in the Bankrupt Court by the lapse of two years.

But complainants come in to take the objection the assignee could not take, though they are not assignees, are not proving creditors, are no parties to the bankrupt proceeding, and in their bill claim nothing in regard to it except that the assignee had no interest whatever, and so could not proceed in bankruptcy or anywhere.

In Tennessee it is held that a third party cannot take advantage of the nullity (not voidability but voidness) of a judgment.

Brightwell v. Mallory, 10 Yer. 198.

Nor of a constitutional question as to a county, as each county must act for itself and not for any other. The court say that at the suit of Bledsoe county, "nor are we required to ascertain whether the constitutional rights of either Marion or Hamilton counties have been invaded. They do not complain of any such infractions, and it does not lie in the mouth of Bledsoe county to do so."

Bridgman v. Rodgers, 1 Col. 259, 264.

Nor can a vendor question the right of a corporation to the land conveyed, because it is *ultra vires* for the corporation to hold land.

Barrow v. Supreme Court, 9 Hum. 306.

So emancipation of a slave could only be questioned by the State (Bedford v. Williams, 5 Col. 208), though absolutely prohibited by statute.

Executors cannot insist upon a forfeiture which the devisees do not insist upon (Williams v. Williams, 15 Lea 453). Can a creditor on a matter the assignee has waived?

In this case, if the assignee represent the rights of the complainants, then as he could not attack the judgment on this ground, neither can the parties he represents.

That he could not so attack is decided in Davis v. Friedlander, 104 U. S. 570, and the cases there quoted from. The court had jurisdiction of the parties and the subject matter

of the suit, as in Eyster v. Gaff, 91 U. S. 522; Thatcher v. Standley, 105 U. S. 467, 470.

See Chaflin v. Houseman, 93 U. S. 130, 143.

Lathrop v. Drake, 91 U. S. 516??

Affidavit required for benefit of defendant. He acted and gave surety without affidavit. Surety cannot object.

Gaw v. Rawley, 3 Head 718.

Competency of officer de facto not disputable.

Latimer v. Rogers, 3 Head 694.

Calloway v. Sturm, 1 Heis. 768.

Ward v. State, 2 Cold. 608.

A third person cannot object that the statute of frauds avoids a contract for sale of land and attach the money paid.

Sneed v. Bradley, 4 Sneed 305.

So of security for costs on new demise in ejectment to secure new plaintiff; defendant cannot object.

Gotham v. Jones, 11 Hum. 353.

So of a judgment, a surety for stay of execution cannot attack it, though voidable by the defendant.

Tallifer v. Herring, 10 Hum. 272–3–4.

So of a passer on turnpike, he cannot defend against payment of toll on ground that the road is not in condition required by law.

Strong v. Dunlap, 10 Hum. 426.

Owners of a turnpike cannot set up a State lien to defeat levy on their property.

F. & C. Tp. Co. v. Young, 8 Hum. 107.

See also Wiley v. Lashlee, 8 Hum. 719.

A turnpike company cannot complain of a law as partial and unconstitutional which they have accepted as part of their charter.

N. Tp. Co. v. Quimby, 8 Hum. 481.

If this be correct, and this question cannot be made by these complainants, it is equally pertinent to the motion to affirm.

MOTION TO AFFIRM.

If it were conceded that this Federal question is in the case and the jurisdiction is entertained, we insist that the Supreme Court of Tennessee decided that question correctly, and its decision ought to be affirmed. The so-called decision, f. 435, 436, R. 115, put into the record, as already shown, after petition to rehear was refused, and at the succeeding term after the case was decided, only to allow this writ of error, is in short that the State court had a right to enforce the lien in this case, and that defendants got a good title to the property notwithstanding § 711, Rev. Statutes, and the provisions of the Revised Statutes embraced in the title 61, "Bankruptcy."

FIRST.

In Lathrop v. Drake, 91 U. S. 517, the Supreme Court were not construing § 711. That decision has no bearing upon its construction, and is entirely consistent with the construction placed upon it in Wente v. Young, 17 Bankrupt Reg. at page 92, which, applying the rule of *noscitur a sociis*, finds that the purpose was not to divest the jurisdiction of the State courts, but merely to enumerate the classes of cases in which the jurisdiction of the district court, under the then existing laws, was recognized as exclusive; and Cheek v. Anderson, 2 Lea 199, and Barton v.

Geiler, 3 Lea 296, furnish an effectual answer to Mr. Estes' argument upon "matters in bankruptcy." § 711 is merely a matter of arrangement and classification in a code, not a change of the existing law. The district court had sole original jurisdiction of proceedings in bankruptcy, and this section merely continues that sole jurisdiction. The fact that § 5047, Rev. Stat., recognizes the right to continue suits, and at the same time gives "like remedies," &c., is conclusive that no change is intended by § 711. Like remedy in a section providing for continuing suits, which, in the nature of things, may be in the State courts, must mean remedies in the same courts. The words of the section, matters and proceedings in bankruptcy, may well have their full scope in the exercise of the jurisdiction in cases strictly of bankruptcy, and do not need to cover proceedings collateral to the proceedings in bankruptcy, as are the remedies of the assignee. A suit by an assignee may or not be "*in bankruptcy*," it may be a plenary suit in any other court. All "matters and proceedings in bankruptcy" are all matters in the case by or against the bankrupt to declare him a bankrupt and discharge him.

The rule, that in codification there is a presumption against change of the existing law, requires this construction to prevail. If the more general construction was meant, why not adopt the wording of the section in regard to patents and copyrights," § 711, sub-sec. 5, which reads, "of all cases arising under the patent right or copyright laws of the United States."*

Even under this clause the State courts have jurisdiction of numerous cases relating to patents. Bloomer v. Mc-

* And the same phraseology is generally used in the clauses defining the jurisdiction of the circuit courts. Rev. St., sec. 629.

Quewan, 14 How. 549–550; Wilson v. Sanford, 10 How. 99; Brooks v. Stolly, 3 McLean 523; Burr v. Gregory, 2 Paine 426; Goodyear v. Day, 1 Blatch. 365.

But it was wholly unnecessary for the State court to construe § 711, or to express any opinion as to whether or not it was operative to divest the State courts of previously existing jurisdiction to enforce the lien, for the reason that the proceedings in the State court for the enforcement of the attorney's lien in the manner disclosed by this record were fully authorized by § 5047, R. S. This provides that where a suit is pending in the State court in behalf of the bankrupt for the recovery of a debt "or other things," the assignee may be substituted, and shall be "permitted to prosecute the action in his own name in like manner and with like effect, as if it had been originally commenced by him."

Here the suit was pending in behalf of Townsend under his cross-bill for another thing, viz., to have his title declared, and his possession quieted in respect to the land (land which would pass to his assignee in bankruptcy). It was also pending for the purpose of declaring the lien of the attorneys on the land. This is necessarily so, as this lien was to be declared upon the land; upon that which would pass to the assignee under the assignment. It must be declared in that particular case or it is lost. Guild v. Bowner, 7 Baxter 206. The assignee, by the express provisions of this section, occupies precisely the same position in the suit as if the cross-bill had been filed by him. Suppose it had? can it be doubted that the court could have declared the lien in favor of his attorneys on the land?

Moreover, the question as to what the suit was pending for is exclusively for the State court to determine; and the

established doctrine of that court on the subject of attorney's liens, commits it to the position that the suit was pending for the purpose, amongst other things, of declaring this lien on the land.

Now it was in the *power* of the State court to have continued ~~that~~ this case for the purpose of enforcing the lien in the case itself. This is not a question for the Federal Courts. If the State court constituted it a pending case for the purpose of enforcing the lien, that is an end of the discussion. It is exclusively for the State court to so continue it as a pending case, and to decide as to whether or not the decree of the court remanding the case, for the purpose, amongst other things, of proceedings concerning the attorney's lien, did so continue it as a pending case. And this the State court did.

But this is in strict conformity to English practice, where the solicitor's lien for costs and disbursements is enforced by a proceeding in the same cause, in which the fund is recovered. Taylor v. Popham, 13 Ves. 59 Sumner's Ed., note.

Now is it possible to doubt that, had there been no bankruptcy proceedings, Townsend could have consented to the remanding of the cause for the purpose of the enforcement of the lien in that case? Had he done so, would not the case have been pending for that purpose? If he could, then the assignee could; because § 5047 *supra*, substitutes him to the place of the bankrupt, and clothes him with all the powers that that person could have exercised, had there been no bankruptcy. It was meet and proper that the enforcement of the lien should have been had in that case, as it would facilitate the acquisition by the assignee of that which was

assets, viz., the land, after all liens and encumbrances had been satisfied.

In Cheek v. Anderson, 2 Lea, at page 200, it is said "the prosecution of a pending suit for any purpose, and especially if it be for the ascertainment of the bankrupt's interest in property by a partnership settlement, would not fall within the meaning of the words."

The suit in Cheek v. Anderson is designated as of the character "of an original bill in the nature of a supplemental bill;" and the proceedings in the pending case for the enforcement of the lien are, we think, of the same character. It follows that if the above view is correct, the State court was not called upon to express any opinion as to the construction of § 711.

The claim that there is a Federal question can be predicated of nothing in this record except the proceeding in the State chancery court to ascertain the amount of the fee of the attorney for which a lien had been declared by the State Supreme Court. The cause was remanded by the State Supreme Court to the chancery court of the State for this proceeding at the instance of the assignee in bankruptcy. This was not a "proceeding in bankruptcy" within the meaning of the bankrupt law. Cheek v. Anderson, 2 Lea 194, citing Cook v. Whipple, 55 N. Y. 150. The only Federal question that can possibly be involved is whether the State court had jurisdiction of the proceeding, the claim being that under the Revised Statutes of the United States it was a proceeding in bankruptcy, of which the Federal Court jurisdiction was exclusive. If the ascertainment of the amount of the fee was not a matter or proceeding in bankruptcy in the purview of the statute, there was no

Federal question. If the State court had concurrent jurisdiction there is no jurisdiction here of this writ of error.

In any bankruptcy or in any *other proceedings* within the jurisdiction of the court under this act, is the language of General Clause 24, Bankrupt Act of 1867.

This is modified in Revised Statute, 5011, in form not substance. "In any proceeding" is substituted for any bankruptcy or in any other proceedings. This is not presumed to change the sense. The former expression clearly distinguishes between bankruptcy proceedings and other proceedings under the act.

SECOND.

But suppose it is incorrect? Still no construction of § 711 was called for; and for the reason that the proceedings for the enforcement of this lien, as respects their validity or invalidity, is a matter entirely foreign to the construction of § 711 or of 5047 either.

If the jurisdiction of the District Court of the United States was *not* exclusive of the State courts, in the sense of ousting them of the jurisdiction previously possessed in respect to the enforcement of liens, then, of course, § 711 does not affect the State courts.

If, on the other hand, it was "exclusive" in the sense of ousting them of jurisdiction in respect to enforcement of liens, by conferring the exclusive jurisdiction upon the United States District Courts, that construction of § 711 does not affect the jurisdiction of the State court here; for the reason that the district court did exercise this exclusive jurisdiction when it ordered the sale of the equity of redemption; and by reason of such exercise, *exhausted*

its jurisdiction; and the jurisdiction exercised by the State court in the enforcement of the lien, in no way conflicted with the jurisdiction of the district court.

This will be apparent, we think, from the consideration of the character of that exclusive jurisdiction in the district court, in respect to real estate of the bankrupt encumbered with liens, at the date of the bankruptcy proceedings.

In considering this question it is necessary to first ascertain the exact *status* of this land, as respects liens, at the commencement of the bankruptcy proceedings.

The attorney's lien existed from the date of the filing of the cross-bill, viz., February, 1869, and was of the nature of an equitable mortgage. (The State court has so decided, and this is exclusively a State question.)

The deed of trust, under which the complainants claim, was made subsequent to the filing of the cross-bill, but previously to the institution of the bankrupt proceedings.

We then have two encumbrances on the land existing at the date of the bankruptcy proceedings—a lien or equitable mortgage—for an unascertained amount, and a deed of trust for an ascertained amount.

Now the true nature of the jurisdiction of the district courts ("exclusive of the State court," let us grant), in respect to the land as thus situated, was a jurisdiction which respected it *as assets to be administered in the bankruptcy proceedings*. What was the assets to be administered? There can be but one answer. It was the surplus which would remain after the encumbrance had been satisfied. The creditors who participate are the *unsecured* creditors of the bankrupt, *i. e.*, all creditors in participating do so in the

character of unsecured creditors. When, therefore, a lien creditor participates, he does so in what remains unpaid of his claims after the security has been applied, and the assets which he so participates in, are the assets upon which no lien exists. McHenry v. La Society, 91 U. S. 60.

Now, as incidental to its jurisdiction in administering the assets, the district court may adjust and liquidate the liens. But for what purpose? It is in order to the proper and complete exercise of this jurisdiction of administering the assets; and to that end it may have the secured creditors brought before it; order a sale of the land free from all liens and encumbrances; adjust and liquidate the secured debts out of the proceeds, with the view of ascertaining if there be any surplus, and if so, as to what that surplus is. Such surplus, with the remaining unencumbered assets, constitutes the assets which it administers, out of which it makes the *pro rata* distribution.

But while it may pursue this course, it is just as clearly settled that it may do otherwise. It may order the land sold, *subject* to the liens and other encumbrances, and administer the proceeds of such sale as the assets of the bankrupt. It is but a different method of reaching the same result, viz, possessing itself of the surplus over and above the encumbrances; and when it pursues this latter course, it is just as full, complete, and *exhaustive* an exercise of its jurisdiction as if it had pursued the former course. It has pursued the latter course in this case by the sale of the equity of redemption. f. 254–56, 262. R. 67–8–9.

A broad discretion is conferred upon the district court by the bankrupt law, as to which of these two courses it shall pursue.

What it does in this regard is exclusively for its own determination.

Clifton v. Foster, 103 Mass., at p. 236–7.
In re Bowie, 2 Bank Reg. 630–1.
In re Ellerhorst, 2 Saw. 223.

That the true theory of the jurisdiction of the district court in matters of bankruptcy, is that it deals with what remains after the lien debts are satisfied—or, what is the same thing, with the value of the land subject to the liens; that is, with the equity of redemption of the bankrupt in the land—is abundantly established by the provisions of the bankrupt law itself, as well as by the decisions of the Federal and State courts upon this subject.

The assignee may release to the lien creditor the bankrupt's right of redemption, upon receiving the excess in value over the encumbrance. R. S. U. S., sec. 5075. (¶ 20.)

The assignee may sell, subject to the incumbrance, even without an order of court. *Ib.*

Bump. on Bky., 622.

Or, under an order of court. ¶ 14.

He should never apply for such order where the value of the property is less than the debt secured.

Bump. on Bky., 174. (10th Ed.)

He acts only in the interest of general creditors, and should institute no proceedings except for their benefit. *Ib.*

In re Mebane, 3 Bank. Reg. 347.
2 Bank. Reg. 426. 1 *Ib.* 628. Bump. p. 622.

The bankrupt court may order a sale of the property

subject to the encumbrances, and leave the mortgagee to a foreclosure proceeding against the purchaser.

Jones on Mortg., § 1235.

In re Ellerhorst, 2 Saw. 219.

Clifton v. Foster, 103 Mass. 233.

In re Ellerhorst *supra*, it is said that the court might, "under the provisions of the 17 and 20 sections, have sold "the mortgaged premises subject to the lien, and left the "mortgagee to a foreclosure suit against the purchaser, "or could have even released the equity of redemption to "the mortgagee in satisfaction of his debt," p. 225; and that the court had jurisdiction to pursue either of these courses as it should judge best for the interest of all concerned.

And in Clifton v. Foster *supra*, it is said that the United States courts "may, in their discretion, *without investigating* "*the validity or extent of the lien*, allow the assignee to sell "the property subject to the lien, and the bankrupt's estate "to be finally settled, without any determination of the "rights claimed under the lien; in which case the petitioner" [i. e. the lien creditor] "would retain those rights "as against the purchaser of the property," p. 236, citing Wiswall v. Sampson, 14 How. 67; Briggs v. Stephens, 7 Law Rep. 281; *In re* McClelland, 1 Bank. Reg. 389; *In re* Bowie, *Ib.* 628; Foster v. Ames, 2 *Ib.* 147, 148. This is in exact accordance with the view on this subject of the Supreme Court of the United States as expressed in McHenry v. La Society, &c., 95 U. S., at p. 60, where it is said that the value of the mortgaged property is "to be ascertained by agreement, sale, or in such other manner as the bankrupt court might direct."

Now, the district court in the present case, upon the petition of the assignee, did order the sale of the equity of redemption in the land; and when it did so, in legal effect, it ordered a sale of the land subject to the liens and encumbrances; for this is precisely what the equity of redemption is.

This definition of an equity of redemption is given in Jones on Mortgages, sec. 6, vol. 1, *viz*: It is an estate in land, and the person entitled to it is the owner of the land; subject to the encumbrance.

The district court in the exercise of its jurisdiction—[a jurisdiction exclusive of the State courts, if you choose]—in respect to this "matter in bankruptcy," instead of having the secured creditors brought before it, and having their liens adjusted, and then selling the land free of the liens, which it had the power to do, and out of the proceeds liquidating these liens, elected to exercise its jurisdiction in the other mode; to order the land sold subject to the liens, and apply the proceeds of *that sale* as assets in bankruptcy, leaving all matters pertaining to the encumbrances to be settled by the purchaser and the lienors between themselves, and when it thus exercised its jurisdiction, it exhausted its jurisdiction.

The district court might have exercised its jurisdiction, in the manner it did, at any time after the appointment of the assignee. It might have so exercised it before the cause was remanded from the Supreme Court of the State as well as after. It was under no obligation to pass in any way, either upon the validity or extent of the lien.

Clifton v. Foster, *supra*.

The right of lien in the attorneys is not a right acquired under the laws of the United States; it, in no sense, arises out of, or under, these laws.

Burlingame Assignee v. Paree, 17 Bank. Reg. 248–249.

The jurisdiction of the State courts in respect to the enforcement of this lien could only be ousted *by the exercise of the right to adjust and liquidate it*, on the part of the United States District Court, assuming (as we are assuming throughout on this line of argument) that its jurisdiction was exclusive of the State courts.

The question of jurisdiction would have arisen, had the district court undertaken to adjust and liquidate the lien at any time during the pendency of the proceeding for its ascertainment and enforcement in the State court; and it may be conceded that it would have arisen, had the district court, at any time pending the bankruptcy proceedings, elected to exercise its jurisdiction in this way; but, having elected to exercise it in the other way, the jurisdiction of the State court remained unaffected, and was as ample and unembarrassed in the enforcement of the attorney's lien, as if no jurisdiction had ever been vested in the United States Courts in respect thereto.

But, recurring to our former argument, we again suggest that the fallacy of Mr. Estes' contention on this point consists in his confounding the declaration of a lien in favor of the attorneys, with the ascertainment of the amount due the attorneys. To *declare* the lien was the exclusive province of the State court. Once declared by that court, it became an existing incumbrance just as if it had been made by contract: relating back to the filing of the cross-bill, if

no further. The property passed to the assignee in bankruptcy with this lien upon it *inchoate*. It was a part of the case pending in the State court. The bankrupt law recognizes and preserves all valid liens. The Federal Court cannot displace them. The assignee administers the estate subject to them. The amplest discretion is given to the asignee as to the manner in which he shall deal with such liens. He may assume and discharge them, or sell subject to them; or, because of their magnitude, may wholly abandon the property upon which they rest. In this case the lien existed because the Supreme Court so declared. Beyond any question the declaration of it was a matter exclusively with the State court. The proceeding to ascertain what *amount* should be secured by it to the attorneys, was another and wholly different matter. Admit that it was a "matter in bankruptcy," and, as such, within the exclusive jurisdiction of the Federal Court, and you must still look to the bankrupt law to know *how* that jurisdiction should be exercised. This law charges the assignee, as an administrative officer of the Bankrupt Court, with the duty, and confers upon him the power to administer the law. The assignee in this case, in a mode of his own choosing, has administered the law, reported his action to the Bankrupt Court, the court has distributed the fund and discharged the bankrupt, and thus met the requirements of the strictest construction of § 711, Revised Code United States, which, if it was within the exclusive jurisdiction of the Bankrupt Court, makes it the *act and judgment of that court.*

To conclude therefore on this point—

1st. The proceeding was one merely to ascertain the amount or value of the incumbrance upon the bankrupt's

estate. The bankrupt law confides this wholly to the discretion of the assignee, allowing him to exercise that discretion by the exercise of his own judgment, by resort to the courts, State or Federal, or otherwise as he may choose. The revision of the bankrupt law did not in any way affect the rights of the assignee himself to go into the State court, when, under the original act, he might have done so.

2d. It was within the assignee's discretion to invoke the jurisdiction of the State court. And

3d. When in conclusion, the assignee acquiesced—sold the right of redemption from this encumbrance, and reported his action to the Bankrupt Court, and the court distributed the fund, and discharged the bankrupt, that was full exercise of the jurisdiction.

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Attorneys for Heiskell, Scott & Heiskell.

Henry Craft

Thos. B. Turley

120-278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1886.

T. P. WINCHESTER, TRUSTEE, ET ALS.,

vs. } No. 1148

J. B. HEISKELL, ET AL.

Brief of Counsel for Plaintiffs in Error

ON MOTION TO DISMISS AND TO AFFIRM.

B. M. ESTES,
Counsel for Plaintiffs in Error.

S. C. TOOF & CO. PRS. & LITHS., MEMPHIS

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vs.

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BRIEF OF COUNSEL FOR PLAINTIFFS IN ERROR,

On Motion to Dismiss and to Affirm.

STATEMENT.

This "ejectment bill," or bill to remove cloud from title, was instituted by the plaintiffs in error against the defendants on 12th February, 1880, in the Chancery Court of Shelby county, Tennessee. The chancellor dismissed the bill. Record p. 84.

On appeal to the Supreme Court of Tennessee the case was first heard before the Commission of Referees. This Commission reported in favor of a reversal of the chancellor's decree. Record p. 86. On exceptions, by a divided court, the report of the Commission of Referees was set aside and the decree of the chancellor affirmed. Record p. 114. A petition for rehearing was filed, which was taken under advisement until the succeeding term, when it was dismissed and the amended decree stating the *Federal question* was entered. Record pp. 114 and 115. To reverse this decree the writ of error is prosecuted.

The plaintiffs in error are the substituted trustee and the beneficiaries in a trust deed made by D. H. Townsend on 18th June, 1875, under which the tract of land in controversy, with other property, is conveyed. Record p. 12.

The Supreme Court of Tennessee in its opinion held that the complainants in the bill were entitled under the doctrine of subrogation to maintain the bill, notwithstanding the security afforded by the trust deed was primarily an indemnity to protect an indorser and surety. Record p. 110.

The bill charges, and the record shows, that D. H. Townsend, in 1867, obtained a judgment against Wm. E. Jones for $1188.25, and at execution sale became the purchaser of the land in controversy at the amount of his judgment and costs. On 16th February, 1869, Annie L. Jones and others—the widow and heirs of Wm. E. Jones—filed their bill in the chancery court at Memphis against D. H. Townsend, seeking to have the sheriff's deed cancelled and the complainants quieted in their title and possession. The defendants in this suit were employed by Townsend as his attorneys to defend the suit, which they did. Such proceedings were had in that litigation that on appeal to the Supreme Court of Tennessee, that court, on 8th December, 1876, pronounced its decree dismissing the bill, declaring a lien on the property then and now in litigation in favor of the defendants in this cause for their "reasonable counsel fee" in defending the suit. By the provisions of the decree the case was remanded to the chancery court, in order that the amount of this "reasonable fee" might be ascertained and the lien in favor of counsel enforced. Record pp. 8, 9, 87, 108.

After the remand to the chancery court, the amount of the fee was ascertained and the property sold under the decree of that court to satisfy it. At this sale the defendants became the purchasers of the property at the amount of their fee, and have since held possession of it, claiming title under that purchase. *Thus the defendants have taken the entire property in litigation—of great value—besides several hundred dollars paid on the fee, for their professional services in defending the title to the property.* Record pp. 25, 35.

Pending this suit of Jones v. Townsend, and on 3d November, 1875, D. H. Townsend was duly adjudicated a bankrupt on his own petition by the District Court of the United States for the Western District of Tennessee. Record pp. 6, 7, &c., and 67.

From that date *until the sale to the defendants in July, 1877*, (Record p. 83) the property in controversy was not only by contemplation of law in the custody of the Bankrupt Court, *but in the actual possession of the assignee in bankruptcy.* Record pp. 67, 68, &c.

ASSIGNMENT OF ERRORS.

1st. The Supreme Court of Tennessee erred in adjudging and decreeing by its modified and supplemental decree—Record p. 115—that the chancery court of Shelby county, Tennessee, had jurisdiction to enforce the defendant's attorney's lien on the property in controversy by the proceedings, decree and sale, as shown in the record, notwithstanding the bankruptcy of D. H. Townsend and the bankrupt proceedings in the District Court of the United States for the Western District of Tennessee, as shown in the record, and notwithstanding the provisions of 711th section of the

Revised Statutes of the United States, and notwithstanding the provisions of the sections of the Revised Statutes embraced in title 61, "Bankruptcy."

2d. The said court erred in adjudging and decreeing that the authority exercised by the State courts in said proceedings was not repugnant to the said laws of the United States.

3d. The said court erred in adjudging that the authority, exercised by the chancery court of Shelby county in its proceedings to enforce the attorney's lien, by order of reference, sale, &c., as shown in the record, was not repugnant to section 711 of the Revised Statutes of the United States.

4th. The said court, in construing the said sections of the Revised Statutes, erred in adjudging and deciding that the State courts had the jurisdiction to declare and enforce said lien (of the defendants) on the land in controversy, and that, under the said proceedings, the defendants acquired a good and valid title to the said land, and that the title is not and was not void, and a cloud on complainants' right and title.

5th. The said court, in construing the sections of the Revised Statutes aforesaid, erred in adjudging and decreeing that the chancery court of Shelby county, Tennessee, had the jurisdiction to enforce the attorney's lien in favor of the defendants on the land in controversy, which was in custody of the Bankrupt Court, and in the possession of the assignee in bankruptcy, and in adjudging and decreeing that the defendants, under said proceedings, acquired a good and valid title thereto.

Brief and Argument.

1st. The *mode* adopted in this case, of presenting the Federal question, is the first and main ground of the motion to dismiss. *Murdock v. City of Memphis, 20 Wall. 590, is a complete precedent for this case.* In that case there was a motion to dismiss on the ground "that none of the questions were involved in the case necessary to give jurisdiction to this court," but the jurisdiction was sustained.

20 Wall. 615, &c., and 637.

By reference to the record in that case (pp. 208, 209 and 210) it will be seen that the Federal question was not decided by the chancellor, nor by the Supreme Court of Tennessee in its decree entered on 7th June, 1870, but that on 5th July a petition for rehearing was refused, and on 6th July a supplemental decree was entered, which for the first time construes the act of Congress, and on this the jurisdiction of this court was sustained.

It will also be seen by reference to 7 Coldwell 483, that the Supreme Court of Tennessee by its opinion did not decide the Federal question. The dissenting opinion of Mr. Justice Bradley in the case 20 Wall. 639, &c.,—states clearly the facts touching the Federal question in that case. There the Federal question was not presented in as clear and full a manner as it is here, yet the learned counsel for the plaintiffs in error (who are two of the defendants in this case) were successful in maintaining the jurisdiction of the court.

Adversary counsel are mistaken in the statement in their brief that the Federal question in this case was first decided on petition for rehearing, &c. It is true that the Supreme

Court of Tennessee in its opinion first delivered, by inadvertence overlooked this question, and the petition for rehearing calls attention to the oversight and insists that the question must be decided; but the record shows that it was fully made before and decided by the Commission of Referees (Record p. 92), and the exceptions of the complainants to that report brought it before the Supreme Court and required a decision of it.

Record p. 105.

The decree of the Supreme Court (Record p. 115) shows that that court clearly decided it, as it was bound to do, upon the exceptions to the report of the Commission of Referees, and decided it against the plaintiff in error.

The original bill in this case alleges circumstantially the bankruptcy of D. H. Townsend (Record p. 10), and prays "that on final hearing a decree may be made pronouncing the claim of title set up by the defendants invalid and a cloud upon complainants' title to said tract of land, also removing their said pretended title as a cloud upon complainants' title, &c. The agreement of counsel, which constituted in part *the evidence* in the case, shows the facts of the bankruptcy and of the bankrupt proceedings.

Now although the chancellor's short decree dismissing the bill does not state specifically the ground of the decision, yet under the allegations and prayer of the bill (including the prayer for general relief) and *the evidence*, this question was before the court for decision, although the chancellor's decree does not specifically refer to this point.

Bartee v. Tompkins, 4 Sneed 623.
Cox v. Waggoner, 5 Sneed 543.
Allum v. Stockbridge, 8 Bax. 356.

The mode of presenting the Federal question in this record is therefore not only warranted by the precedent mentioned, but is clearly within the principles of the other decisions of the court. This court is so familiar with the cases that they need not be cited.

2d. It is quite clear that the decree (Record p. 115) presented and decided against the plaintiffs in error, a Federal question. They claimed title to the land under Townsend's trust deed, and the defendants claimed and held possession under the proceedings and decree of the State court. The plaintiffs in error claimed that under section 711 of the Revised Statutes of the United States the defendant's pretended title was void, because the State court had no jurisdiction *of the subject matter* of the suit under which they obtained their said pretended title. This necessarily involved "the validity of an authority, exercised under a State, on the ground of its being repugnant to the laws of the United States," and the decision was in favor of the validity of the authority thus exercised. The authority exercised by the chancery court of Shelby county, Tennessee, under which defendants claim title to the lands, was repugnant to the laws of the United States.

3d. It is next objected by the defendants that the plaintiffs are not proper parties to attack their title or the decree under which they hold it. Let it be assumed that under the decree of the Supreme Court of Tennessee, in Jones v. Townsend, declaring defendant's lien, they were senior mortgagees or incumbrancers, and that the plaintiffs in error, under Townsend's trust deed, were junior mortgagees. Can it be doubted that a junior mortgagee, who is not a party to the proceedings, under which the senior incumbrancer

forecloses his lien, and obtains title, can, if those proceedings are void, attack the title set up thereunder, and have that title declared void, or, which is this case according to the Tennessee authorities, maintain his ejectment suit in equity to recover the property?

Jones v. Perry, 10 Yerg. 59–83.
Almony v. Hicks, 3 Head 39.
Kerr v. Kerr, 3 Lea 228.

Removing cloud on title created by void decree.

Arnold v. Moyers, 1 Lea 308.
Baines v. Perry, 1 Lea 38.
Goodman v. Mining Co., 1 Head 173.

Plaintiffs in error claim that their title under their trust deed is superior to that claimed by defendants under their decree, which is void. The question of priority between the incumbrancers is not made in the case, nor is the question of the satisfaction of the incumbrances. If defendant's title, under the decree of the State court, is valid, then complainant's claim is defeated; if it is void, it is a nullity and a cloud on *the legal title* conveyed to the trustee by Townsend, and the plaintiffs in error seek to have it so declared. The right of junior mortgagees to redeem is a common law right, and applies to deeds of trust as well as mortgages.

2 Jones on Mortgages, sec. 1064, &c.
2 Story Eq., 1232, 1233, &c.

Sale made under foreclosure of senior mortgage wholly inoperative as to the rights of junior mortgagee who was not a party to the suit.

Vanderkemp v. Shelton, 11 Page, ch. 28.
Branard v. Cooper, 10 N. Y. 356.
1 Jones on Mortgages, sec. 732.

The plaintiffs in error were not parties to or bound by the proceedings and decree of the State court.

Freeman on Judgments, sec. 156.
Boro v. Harris, 13 Lea 44.
5 Sneed 105. 12 Heis. 34. 4 Heis. 585.

In Tennessee a bill to remove cloud may be maintained by a party out of possession, or where the defendant's title is void on its face.

Jones v. Perry, 10 Yerg. 59.
Porter v. Jones, 6 Cold. 318.
Almony v. Hicks, 3 Head 41.
Williams v. Taliaferro, 1 Cold. 38.
Anderson v. Talbot, 1 Heisk. 408.

It is called an "*ejectment bill.*"
1 Lea 40.

The motion to dismiss ought to be disallowed, and if that is done the case ought not to be decided on its merits in this summary way, as the defendants attempt to do by their "*motion to affirm.*" If the jurisdiction is sustained, the case ought to be argued in the regular way when it is reached on the docket.

In Pennywit v. Eaton, 15 Wall. 381, the Chief Justice says: "We cannot therefore dismiss the case for want of jurisdiction, although we may have a very clear conviction that the decision of the State court was correct." Unless it is plain that the writ of error was prosecuted for delay, the court will not decide the case on its merits as now presented.

However, under protest, we proceed to discuss the merits in answer to defendants' "motion to affirm."

4th. This is a naked question of potestas jurisdictionis, and it is submitted that the chancery court of Shelby county had no jurisdiction to "*ascertain and liquidate*" the lien of the defendants, because of the bankruptcy of D. H. Townsend and the bankrupt proceedings at the time in the District Court.

Section 711 of the Revised Statutes vests the jurisdiction of "all matters and proceedings in bankruptcy" in the courts of the United States, and provides that the jurisdiction thus vested "*shall be exclusive of the courts of the several States.*" In the same category with "all matters and proceedings in bankruptcy," are placed by this section "all crimes and offenses cognizable under the laws of the United States," "all civil cases of admiralty and maritime jurisdiction," "all suits and proceedings against embassadors," &c., and of course a State court has under the law as much right to exercise jurisdiction over one of these subject matters as another. Noscitur a sociis. In each case the jurisdiction of State courts is imperatively excluded. What would be said of a judgment of a State court in the case of "a crime cognizable under the laws of the United States" or in a proceeding against an embassador? While this section has not been authoritatively construed by this court, the intimations in Claflin v. Houseman, 93 U. S. 130, and McHenry v. La Societe, etc., 95 U. S. 58, tend to justify the inference that in this case it will be held that the State court had no jurisdiction. The interdict of the statute extends to "*all* matters and proceedings in bankruptcy." It is submitted that this was a "*matter*" in bankruptcy. Sec. 4972 of the Revised Statutes gives the general scope and designation of "matters and proceedings in bankruptcy." The jurisdiction extends to "*all*

cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy." Here was "*a case*" and "*a controversy*" of the kind mentioned, over which a State court exercised jurisdiction. It extends "to the ascertainment and liquidation of the liens and other specific claims" on the property of the bankrupt. Here was a case in which a State court exercised jurisdiction to "*ascertain and liquidate*" a lien on bankrupt property.

Mr. Justice Bradley, in Lathrop v. Drake, 91 U. S. 517, clearly points out the distinction between "matters" and "proceedings" in bankruptcy. Speaking of the jurisdiction of the District Court, he says: "Of this there are *two* "*distinct classes:* first, jurisdiction as a court of bankruptcy "over the *proceedings* in bankruptcy initiated by the peti- "tion and ending in the distribution of assets amongst the "creditors, and the discharge or refusal of a discharge of "the bankrupt; second, jurisdiction as an ordinary court, of "suits at law or in equity brought by or against the assignee "in reference to alleged property of the bankrupt or to "claims alleged to be due from or to him. The language "conferring this jurisdiction is very broad and general. " * * The various branches of this jurisdiction are after- "wards specified, resulting, however, in the *two general classes* "before mentioned." It is plain that the language "matters and proceedings" means something more than the mere *proceedings* in the court. It embraces the assets and all questions of claims to such assets or of lien or priority of right to them. These are clearly "matters" in bankruptcy within the meaning of the act.

The question whether, since the Revised Statutes, a State court had jurisdiction of a suit by an assignee to recover

bankrupt assets has been frequently before the courts, and the decisions are in conflict upon it; but the jurisdiction exercised here of "ascertaining and liquidating" a lien on bankrupt assets at the suit of a creditor is a very different thing. The dissenting opinion of Tallcot, J., of the Supreme Court of New York, in Wente v. Young et al., 17 B. Reg. 95, is a valuable discussion of the question of the meaning and construction of sec. 711 of the Revised Statutes.

Mr. Jones, in sec. 1232 of volume 2 of his work on Mortgages, says:

"The Federal Courts have exclusive jurisdiction of all matters and proceedings in bankruptcy. These matters include all things treated of or affected by the legislation upon the subject of bankruptcy."

Judge Story, in Ex-parte Christe, 3 How. (Curtis Deg. 458) in construing a clause in the bankrupt act of 1841, which was the same as sub-sec. 6 of sec. 4972 of Revised Statutes, says: "This clause is manifestly added in order "to prevent the force of any argument that the specific "enumeration of the particular classes of cases ought to "be construed as excluding all others not enumerated, &c." And on page 457 and 458 he says: "If the sentence had "stopped here there could have been no reasonable ground "to doubt that it reached *all cases* where the *rights*, *claims* "*and property* of the bankrupt or those of his assignees *are* "*concerned*, since they are *matters* arising under the act and "are necessarily involved in the due administration and set-"tlement of the bankrupt estate, &c."

"From the filing of the petition in bankruptcy the property is in the custody of the Bankrupt Court, and the object of the law is to marshal and distribute these assets." "No

court of any independent State jurisdiction can withdraw the property surrendered and determine in any degree the manner of its distribution."

Bump. on Bankruptcy (10 Ed.) 316, 317.
2 B. Reg. 130.
7 B. Reg. 513.

The record in this case shows that the land was conveyed and delivered to the assignee, *and that it remained in his actual possession until after the defendants had obtained their decree vesting title in them.*

Record pp. 67, 68.

5th. Sec. 5047 of the Revised Statutes has no application to this case, because at the time of the commencement of the bankrupt proceedings and of the adjudication, *there was no pending suit between Heiskell, Scott & Heiskell and D. H. Townsend, and no suit for the enforcement of the attorney's lien.* Townsend was adjudicated a bankrupt on 3d November, 1875, (Record p. 6 and 7 and 67), and the decree of the Supreme Court of Tennessee *declaring the lien* in Jones v. Townsend was not entered until 8th December, 1876, *more than thirteen months after the adjudication.*

Record p. 8 and 9, 86, 107.

It is thoroughly well settled in Tennessee that when the court *declares* the attorney's lien, the attorney and client, for the first time, assume antagonistic relations to each other, and that when the parties are *sui juris* this declaration of the lien is simply *the basis of a suit*, which the attorney must institute to enforce his lien. It is not proper to do this in the preceding suit.

In Perkins v. Perkins, 9 Heisk 97, it is said: "When "the client is *sui juris* we think the court should, in the

"cause in which the services are rendered, do no more "than *declare* the lien, and if the amount be not settled "between them by contract, leave the attorney to enforce "his claim by an appropriate proceeding against his client, "unless the amount be settled by contract, in which case "the court may enforce the lien by decree.

Brown & Reid v. Bigley, 3 Tenn. Ch. 618.
Steel v. Chester, 1 Leg. Rep. 211.

The lien must *be stated or declared* in the suit in which the services are rendered, and this becomes *the basis* of a proper suit by the attorney against the client.

Hunt v. McClanahan, 1 Heis. 504.
Guild v. Borner, 7 Bax. 266.
And cases above cited.

The *declaration* of the lien, therefore, by the Supreme Court of Tennessee in Jones v. Townsend, simply furnished *the basis of a suit* which the law required the attorneys to institute against the client, and Jones v. Townsend was in no sense a pending suit between Heiskell, Scot & Heiskell and Townsend, although the lien, when declared, related to the date of the institution of the suit. The fact that the attorneys proceeded improperly to enforce their lien in the suit of Jones v. Townsend, does not alter the legal effect of what was done; for when they had the case remanded and took further proceedings in that case, they, under the Tennessee authorities, instituted and prosecuted a new litigation.

6th. The equivocal acts of the assignee in bankruptcy, as disclosed in the record, cannot affect the question of jurisdiction of the subject matter.

"When the tribunal has not jurisdiction over the subject matter, no averment can supply the defect, no amount of

proof can alter the case." "Neither the acquiescence of the parties nor their solicitations can authorize any court to determine any matter over which the law has not authorized it to act."

Freeman v. Judgments, sec. 120, and cases cited in note.
Dicks v. Hatch, 10 Iowa 380.
Moore v. Ellis, 18 Mich. 77.
Flushman v. Walker, 93 Ill. 318.
Agee v. Dement, 1 Hump. 332.
White v. Buchanan, 6 Cold. 33.
Ferris v. Fort, 2 Tenn. Ch. 150.

If the jurisdiction of the State court was interdicted by the statute, no consent or act of the assignee, and not even an order of the District Court, could give it.

The alleged sale by the assignee on 27th February, 1879—more than a year after the defendants obtained their supposed title and the possession under the decree of the State court—of the equity of redemption in this land could not of course confer jurisdiction on the State court.

Record pp. 67 and 68.

No such act could confer jurisdiction on a court that had not the jurisdiction by law. Besides, this sale was made *more than a year after the jurisdiction had been exercised by the State court*, and it was not "*a sale of the property*" subject to the incumbrance, as provided by sec. 5066 of the Revised Statutes, nor "a release to the creditor of the bankrupt's right of redemption," as provided by sec. 5075. Such a sale seems not to find any warrant in the bankrupt law.

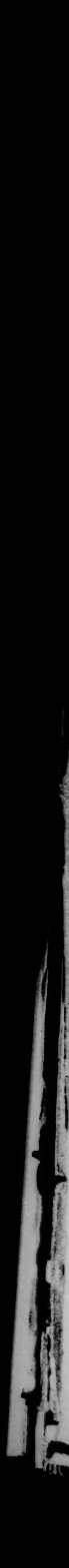
7th. The legal, and not the equitable theory, of a mortgage is established in Tennessee.

3 Pomeroy's Eq. Jur., sec. 1186–88.
Henshaw v. Wells, 9 Hump. 568.
Vance v. Johnson, 10 Hump. 214.

The legal rights of a junior mortgagee are distinct from those of the mortgagor, and but for the alleged foreclosure of defendant's lien in this case the trustee would have the legal title to this property, and would be entitled to the possession. He and his *cestui que* trusts had the right to stand apart from the proceedings, to foreclose the lien by the senior incumbrancers, and afterwards to attack their title, acquired under those proceedings, on the ground that they were void. This is a suit to try title, in which plaintiffs claim under the Townsend trust deed, and the defendants claim under the decree of the State court. The plaintiffs say their title is superior to that of the defendants because the latter is void, and this is the point to be decided. It is not a question of informalities or irregularities in the bankrupt proceedings, and the case should not be considered on any such ground. It is simply a claim that this was "a matter in bankruptcy," and the State court had no jurisdiction of the subject matter which it attempted to conclude by its judgment. Under the plain provisions of the Statutes of the United States the judgment was void.

It is submitted that the case ought not to be dismissed for want of jurisdiction, and if heard at this time on its merits, the decree of the State court ought to be reversed.

B. M. ESTES,
Solicitor for Plaintiffs in Error.



120-273

IN THE

Supreme Court of the United States.

No. 1148.

T. P. WINCHESTER ET AL., PLAINTIFFS IN ERROR,

vs.

J. B. HEISKELL ET AL., DEFENDANTS IN ERROR.

BRIEF IN REPLY TO BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS.

CRAFT, TURLEY & HUMES,
Attorneys for Defendants in Error.

JUDD & DETWEILER, PRINTERS.

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BRIEF IN REPLY TO BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS.

The comment (by italicizing) in brief for plaintiffs in error on the fact that defendants obtained the entire property for their fee is calculated to create a wrong impression.

The fee had been ascertained in the manner directed by the Supreme Court decree—upon proof as to its reasonable value. Not being paid, defendants had no other alternative but to enforce their lien by a sale of the land at public vendue. At this sale, in order to protect their rights, they bid the amount of their fee, and only so bid when they found that no one would bid the amount of the fee. (F. 188, p. 51.)

As there was no higher bid—some of the complainants being present and declining to bid (f. 186–7, p. 50–51)—of course the property was struck off to them, but subject to

two years' redemption. The defendants, *even after the expiration of the time for redemption*, offered to take their fee and release the land, which was declined. (F. 165–6, p. 45.) There was thus no other alternative but to retain the land.

In Murdock *vs.* Memphis, 20 Wall., 590, the Federal question was necessarily involved and raised by the pleadings, inasmuch as the asserted rights of complainants involved a construction of the act of Congress ceding the navy yard.

The brief for plaintiffs in error concedes that the attorney's lien must be declared in the pending case, and when so declared relates to the institution of the suit. It necessarily follows that the case was pending from the institution of the suit as to the attorney's right to have his lien declared, and therefore was so pending when the bankruptcy proceeding was instituted. While the declaration of the lien may have properly been the basis for an independent suit, surely it was competent for the contending parties as to the fee to agree for its determination in that suit, and for the State court to so order. And this is just what was done (f. 406, pp. 108–9), and when the State court ordered the remanding of the case for that purpose, the subsequent proceedings were in *that* case, not in some other case, and were a continuation of *that* case for the determination of the rights of the parties respecting the fee. Consequently the proceeding was authorized by sec. 5047, R. S. U. S., and sec. 711 was not involved.

It makes no difference as to the *time* the equity of redemption in the land—*i. e.*, the land subject to the incumbrances—was ordered sold by the district court of the United

It was so ordered & sold, long before this suit was begun

States. When it did so it exhausted its jurisdiction, and no question as to the exclusiveness of its jurisdiction is involved, because its jurisdiction has already been exercised.

HENRY CRAFT,
T. B. TURLEY,
L. W. HUMES,
Attorneys for Defendants in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1282.

EXPARTE: IN THE MATTER OF LORENZO SNOW, PETITIONER, APPELLANT,

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, TERRITORY OF UTAH.

FILED NOVEMBER 10, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Petition.*

In the District Court of the Third Judicial District, Territory of Utah.

In the Matter of the Application of LORENZO SNOW for a Writ of *Habeas Corpus.*

The petition of Lorenzo Snow respectfully shows that he is now a prisoner confined in the custody of Frank H. Dyer, United States marshal in and for the Territory of Utah, in the penitentiary of said Territory, at the county of Salt Lake, in said Territory, for a supposed criminal offence against the United States, to wit, unlawful cohabitation.

Your petitioner also shows that such confinement is, by virtue of the judgment warrant and proceedings of record, including three indictments against your petitioner, his arraignments thereon, and pleas thereto, respectively, as well as demurrers to such pleas, decisions thereof, and verdicts of the jury, being the record of said matters in the district court of the first judicial district of the Territory of Utah, copies of all of which are hereto annexed and marked, respectively, Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, and P.

And your petitioner further shows that under said judgment, a copy of which is marked Exhibit "P," and in execution thereof, he has been imprisoned in the penitentiary aforesaid for more than six months, to wit, continuously since the 12th day of March, A. D. 1886, and has paid three hundred dollars in satisfaction of the fine adjudged against him, and all the costs awarded and assessed against him on said prosecution.

And your petitioner further states that he is advised and verily believes that his imprisonment is illegal, and that such illegality consists in this: that the court had no jurisdiction to pass judgment against your petitioner upon more than one of the indictments or records referred to in its said judgment, for the reason that the offence therein set out is the same as that contained and set out in each of the other said indictments and records, and the maximum punishment which the court had authority to impose was six months' imprisonment and a fine of three hundred dollars.

2

That by his said imprisonment your petitioner is being punished twice for one and the same offence.

Wherefore your petitioner prays a writ of *habeas corpus*, to the end that he may be discharged from custody.

LORENZO SNOW.

TERRITORY OF UTAH, } ss:
Salt Lake County, }

Lorenzo Snow, the petitioner above named, being duly sworn, says that he has heard read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except

as to matters therein stated on information and belief, and as to those matters he believes it to be true.

LORENZO SNOW.

Subscribed and sworn to before me this 21st day of October, A. D. 1886.

[NOTARIAL SEAL.]

JAMES JACK,
Notary Public.

3 EXHIBIT A.

Indictment.

UNITED STATES OF AMERICA, } ss:
Territory of Utah, }

At a stated term of the district court of the first judicial district in and for the Territory of Utah, begun and holden at the city of Ogden, within and for the district and Territory aforesaid, on the sixteenth day of November, A. D. 1885, and continued by adjournment to and including the second day of December, A. D. 1885.

UNITED STATES OF AMERICA *against* LORENZO SNOW.

The grand jurors of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empaneled and sworn, on their oaths do find and present that Lorenzo Snow, late of said district, in the Territory aforesaid, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-five, at the county of Box Elder, in the said district, Territory aforesaid, and within the jurisdiction of this court, and on divers other days and times thereafter, and continuously between said first day of January, A. D. 1885, and the first day of December, A. D. 1885, did then and there unlawfully live and cohabit with more than one woman, to wit, with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H. Snow, Phœbe W. Snow, and Minnie Jensen Snow; and during all the periods aforesaid, at the county aforesaid, he, the said Lorenzo Snow, did unlawfully claim, live, and cohabit with all of said women as
4 his wives, against the form of the statute of said United States in such case made and provided, and against the peace and dignity of the same.

V. BIERBOWER,
Ass't U. S. District Att'y.

J. W. McNUTT,
Foreman of Grand Jury.

Indictment No. 742 filed in open court, properly endorsed a true bill, etc., and with the names of the witnesses, on the 5th day of December, 1885.

EXHIBIT B.

Court Minute Entry of Arraignment.

(Title of court and cause.)

In this action, the defendant being in court, and upon the indictment herein being read to him, on motion of R. K. Williams, Esq., of counsel for said defendant, given until Monday morning next to plead thereto.

ORLANDO W. POWERS, *Judge,*

EXHIBIT C.

Defendant's Plea.

In open court, Friday, December 11th, A. D. 1885.

(Title of court and cause.)

This case came regularly on to be heard upon the demurrer of defendant to the indictment therein. Said demurrer was argued by counsel, R. K. Williams for said defendant, and V. Bierbower, Esq., assistant United States attorney, for the Government, and submitted to the court for judgment and decision; and the court, now here being fully advised in the premises, and due deliberation being thereupon had, it is ordered by the court that said demurrer be, and the same is hereby, overruled; to which order and ruling of the court the said defendant, by his said counsel, duly excepted.

Said defendant, upon being asked to plead to said indictment, pleads not guilty thereto.

ORLANDO W. POWERS, *Judge.*

EXHIBIT D.

Court Minutes of Trial.

In open court, Wednesday, December 16, 1885.

(Title of court and cause.)

This cause came regularly on for trial. The United States was represented by V. Bierbower, Esq., assistant United States district attorney, and the said defendant by Messrs. Bennett, Harkness & Kirkpatrick, F. S. Richards, R. K. Williams, C. C. Richards, and H. H. Rolapp. Ready for trial. Thereupon came a jury, to wit: Frank Carson, A. I. Stone, Adam Kuhn, Alex. T. Bowman, George Bune, E. W. Smout, John Keck, Benjamin Garr, D. H. Spencer, Thomas Grant, Joseph Smith, and Frederick Foy, good and lawful men, residents of the first judicial district, who, being regularly empaneled, tried, and sworn well and truly to try the case, sat together and heard the testimony of the witnesses in part, and the further hearing and trial of the cause is adjourned until to-morrow morning at 10 o'clock.

ORLANDO W. POWERS, *Judge.*

In open court, Wednesday, December 30th, A. D. 1885.

The jury heretofore empaneled in this cause again sat together and heard the testimony of the witnesses in conclusion, the arguments of counsel and the instructions by the court, retired from the bar of the court in charge of a sworn officer to consider of their verdict, and subsequently returned into court, and being
6 called answered to their names, and on their oaths say: "We, the jury empaneled in the above-entitled cause, find the defendant, Lorenzo Snow, guilty as charged in the indictment."

Whereupon the court fixes Saturday, January 16th, 1886, as time for passing sentence.

ORLANDO W. POWERS, *Judge.*

EXHIBIT E.

Verdict of Jury.

In open court, Thursday, December 31st, A. D. 1885.

(Title of court and cause.)

We, the jury empaneled in the above-entitled cause, find the defendant, Lorenzo Snow, guilty as charged in the indictment.

D. H. SPENCER, *Foreman.*

Endorsed: Filed December 31st, 1885. A. C. Emerson, clerk.

EXHIBIT F.

Indictment.

UNITED STATES OF AMERICA, *Territory of Utah.* } *ss:*

At a stated term of the district court of the first judicial district in and for the Territory of Utah, begun and holden at the city of Ogden, within and for the district and Territory aforesaid, on the sixteenth day of November, A. D. 1885, and continued by adjournment to and including the second day of December, A. D. 1885.

UNITED STATES OF AMERICA *against* LORENZO SNOW.

The grand jurors of the United States of America within
7 and for the district aforesaid, in the Territory aforesaid, being duly empaneled and sworn, on their oaths do find and present that Lorenzo Snow, late of said district, in the Territory aforesaid, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-four, at the county of Box Elder, in the said district, Territory aforesaid, and within the jurisdiction of this court, and on divers other days and times thereafter, and continuously between said first day of January, A. D. 1884, and the thirty-first day of December, A. D. 1884, did then and there unlawfully live and cohabit with more than one woman, with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H.

Snow, Phœbe W. Snow, and Minnie Jensen Snow; and during all the period aforesaid, at the county aforesaid, he, the said Lorenzo Snow, did unlawfully claim, live, and cohabit with all of said women as his wives, against the form of the statute of said United States in such case made and provided, and against the peace and dignity of the same.

V. BIERBOWER,
Ass't U. S. District Att'y.

J. W. McNUTT,
Foreman of Grand Jury.

Indictment No. 743, filed in open court, properly endorsed a true bill, etc., and with the names of the witnesses, on the 5th day of December, 1885.

EXHIBIT G.

Court Minute Entry of Arraignment.

(Title of court and cause.

In this action, the defendant being in court, and upon the indictment herein being read to him, was, on motion of R. K. Williams, Esq., of counsel for said defendant, given until Monday morning next to plead thereto.

ORLANDO W. POWERS, *Judge.*

8 EXHIBIT H.

Defendant's Plea.

In open court, Friday, December 11th, A. D. 1885.

(Title of court and cause.

This cause came regularly on to be heard upon the demurrer of defendant to the indictment herein. Said demurrer was argued by counsel, R. K. Williams, for said defendant, and V. Bierbower, Esq., assistant United States attorney, for the Government, and submitted to the court for judgment and decision; and the court now here, being fully advised in the premises and due deliberation being thereupon had, it is ordered by the court that said demurrer be, and the same is hereby, overruled; to which order and ruling of the court the said defendant, by his said counsel, duly excepts.

Said defendant, upon being asked to plead to said indictment, pleads not guilty thereto.

ORLANDO W. POWERS, *Judge.*

EXHIBIT I.

Plea of Former Conviction and Court. Minutes of Trial.

In open court, Wednesday, December 16, 1885.

(Title of court and cause.

This case came regularly on for trial; the ass't U. S. district

attorney, V. Bierbower, Esq., appearing for the United States and Messrs. Bennett, Harkness & Kirkpatrick, F. S. Richards, R. K. Williams, C. C. Richards, and H. H. Rolapp, for defendant. Whereupon counsel for defendant moves the court that the defendant be allowed to enter a further plea herein in bar of the conviction under this indictment, which, being allowed by the court, said defendant enters the following oral plea:

9 And now comes the said defendant, and protesting that he is not guilty of the premises charged, and by leave of court for a further plea herein saith that the United States ought not to further prosecute the said indictment against him, the said Lorenzo Snow, because that since his former plea herein he has been twice convicted of the same offence charged in this indictment by the judgments of this court, to wit, the district court of the first judicial district of the Territory of Utah, rendered at the city of Ogden, in the county of Weber, on the thirty-first day of December, 1885, and on the fifth day of January, 1886, respectively—that is, on the days and at the place and in the court aforesaid—he was found guilty of the same offence charged in this indictment by the verdicts of two juries, which verdicts are unreversed and in full force.

And for a further specification of his plea the said defendant saith that the grand jury of this court, for the November term thereof of the year 1885, duly empaneled, charged, and sworn to inquire of offences against the United States within the jurisdiction of this court, on the fifth day of December, 1885, presented and filed in this court in due form three indictments against this defendant, in words and figures following, to wit:

UNITED STATES OF AMERICA, }
Territory of Utah, } *ss:*

At a stated term of the district court of the first judicial district in and for the Territory of Utah, begun and holden at the city of Ogden, within and for the district and Territory aforesaid, on the sixteenth day of November, A. D. 1885, and continued by adjournment to and including the second day of December, A. D. 1885.

10 UNITED STATES OF AMERICA *against* LORENZO SNOW.

The grand jurors of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empaneled and sworn, on their oaths do find and present that Lorenzo Snow, late of said district, in the Territory aforesaid, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-three, at the county of Box Elder, in the said district, Territory aforesaid, and within the jurisdiction of this court, and on divers other days and times thereafter, and continuously between said first day of January, A. D. 1883, and the thirty-first day of December, A. D. 1883, did then and there unlawfully live and cohabit with more than one woman, to wit, with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H. Snow, Phœbe W. Snow, and Minnie Jensen Snow, and during

all the period aforesaid, at the county aforesaid, he, the said Lorenzo Snow, did unlawfully claim, live, and cohabit with all of said women as his wives, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same.

V. BIERBOWER,
Ass. U. S. Dis. Attorney.

J. W. McNUTT,
Foreman of Grand Jury.

Endorsed: No. 741. First district court, Territory of Utah. The United States of America against Lorenzo Snow. Indictment for unlawful cohabitation. A true bill. J. W. McNutt, foreman of grand jury.

11 Presented in open court by the foreman of the grand jury and filed by me this fifth day of December, 1885.

A. C. EMERSON, *Clerk.*

V. BIERBOWER,
Ass't U. S. Attorney.

Witnesses examined before the grand jury: C. J. Cory, Lucius A. Snow, Minnie Jensen Snow, Nellie Hansen, Nellie Colebrook, D. H. Peery, Mary Houtz Snow, Eleanor Snow, Harriet A. Snow, Mrs. Lorenzo Snow, Jr., Amelia Hansen, Emma Josephsen, John F. Olsen, Maria Nichols, Frank H. Snow, Dr. J. B. Carrington.

UNITED STATES OF AMERICA, }
Territory of Utah, } *ss:*

At a stated term of the district court of the first judicial district in and for the Territory of Utah, begun and holden at the city of Ogden, within and for the district and Territory aforesaid, on the sixteenth day of November, A. D. 1885, and continued by adjournment to and including the second day of December, A. D. 1885.

UNITED STATES OF AMERICA *against* LORENZO SNOW.

The grand jurors of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empaneled and sworn, on their oaths do find and present that Lorenzo Snow, late of said district, in the Territory aforesaid, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-four, at the county of Box Elder, in the said district, Territory aforesaid, and within the jurisdiction of this court, and on divers other days and times thereafter and continuously between said first day
12 of January, A. D. 1884, and the thirty-first day of December, A. D. 1884, did then and there unlawfully live and cohabit with more than one woman, to wit, with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H. Snow, Phoebe W. Snow, and Minnie Jensen Snow; and during all the periods

aforesaid, at the county aforesaid, he, the said Lorenzo Snow, did unlawfully claim, live, and cohabit with all of said women as his wives, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same.

V. BIERBOWER,
Ass't U. S. Dist. Attorney.

J. W. McNUTT,
Foreman of Grand Jury.

Endorsed: No. 743. First district court, Territory of Utah. The United States of America *against* Lorenzo Snow. Indictment for unlawful cohabitation. A true bill. J. W. McNutt, foreman of grand jury.

Presented in open court by the foreman of the grand jury and filed by me this fifth day of December, 1885.

A. C. EMERSON, *Clerk.*

V. BIERBOWER,
Ass't U. S. Attorney.

Witnesses examined before the grand jury: C. J. Corey, Lucius A. Snow, Minnie Jensen Snow, Nellie Hansen, Nellie Colebrook, D. H. Peery, Mary Houtz Snow, Eleanor Snow, Harriet A. Snow, Mrs. Lorenzo Snow, Jr., Amelia Hansen, Emma Josephsen, John F. Olsen, Maria Nichols, Frank H. Snow, Dr. J. B. Carrington.

UNITED STATES OF AMERICA, }
Territory of Utah, } *ss:*

13 At a stated term of the district court of the first judicial district in and for the Territory of Utah, begun and holden at the city of Ogden, within and for the district and Territory aforesaid, on the sixteenth day of November, A. D. 1885, and continued by adjournment to and including the second day of December, A. D. 1885.

UNITED STATES OF AMERICA *against* LORENZO SNOW.

The grand jurors of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empaneled and sworn, on their oaths do find and present that Lorenzo Snow, late of said district, in the Territory aforesaid, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-five, at the county of Box Elder, in the said district, Territory aforesaid, and within the jurisdiction of this court, and on divers other days and times thereafter, and continuously between said first day of January, A. D. 1885, and the first day of December, A. D. 1885, did then and there unlawfully live and cohabit with more than one woman, to wit, with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H. Snow, Phœbe W. Snow, and Minnie Jensen Snow; and during all the periods

aforesaid, at the county aforesaid, he, the said Lorenzo Snow, did unlawfully claim, live, and cohabit with all of said women as his wives, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same.

V. BIERBOWER,
Ass't U. S. District Attorney.

J. W. McNUTT,
Foreman of Grand Jury.

Endorsed: No. 742. First district court, Territory of Utah. The United States of America against Lorenzo Snow. Indictment
14 for unlawful cohabitation. A true bill. J. W. McNutt, foreman of grand jury.

Presented in open court by the foreman of the grand jury and filed by me this fifth day of December, 1885.

A. C. EMERSON, *Clerk.*

V. BIERBOWER,
Ass't U. S. Attorney.

Witnesses examined before the grand jury: C. J. Corey, Lucius A. Snow, Minnie Jensen Snow, Nellie Hansen, Nellie Colebrook, D. H. Peery, Mary Houtz Snow, Eleanor Snow, Harriet A. Snow, Mrs. Lorenzo Snow, Jr., Amelia Hansen, Emma Josephsen, John F. Olsen, Maria Nichols, Frank H. Snow, Dr. J. B. Carrington.

That on the eleventh day of December, 1885, this defendant was arraigned in this court on each of said indictments, and on the sixteenth day of December, 1885, pleaded not guilty to each of said indictments, and to the alleged offence charged in each.

That said three indictments were all found for unlawful cohabitation against the defendant upon the testimony of witnesses examined before said grand jury on one oath and one examination as to the alleged offence during the entire time mentioned in all of said three indictments, and upon the testimony of witnesses given on an examination covering the whole time specified in said three indictments.

That on the thirtieth day of December, 1885, this defendant was first put upon his trial in this court, before the court and a jury duly empaneled, sworn, and charged to try the issue presented by the third of said indictments, to wit, the indictment charging unlawful cohabitation from the first day of January to the first day of
15 December, 1885, and the plea aforesaid thereto, and such proceedings were had therein that on the thirty-first day of December, 1885, the said jury rendered in this court a verdict of guilty against the defendant in manner and form as charged in said third indictment, and said verdict is of record in this court and not set aside or in anywise impeached or reversed.

And the defendant saith that he is the identical person charged in all said three indictments, and the offence charged in all said indictments is one continuous offence and the same offence, and not divisible, and he prays judgment that he be discharged and dis-

missed from the premises in the indictment to which this plea is made.

To which said plea of said defendant the United States district attorney orally demurs, for the reason that said plea does not state facts sufficient in law to be a bar to further prosecution, which said demurrer is duly argued by said counsel and submitted to the court for decision.

And the court now here being fully advised in the premises, and due deliberation being thereupon had, does consider that said demurrer is well taken, and that the same ought to be, and the same is hereby, sustained.

To which ruling of the court said defendant, by his said counsel, duly excepts.

The said parties then being ready for trial, thereupon came a jury, to wit, Walter Holbrook, W. H. Wattis, George B. Douglas, A. C. Smith, P. J. Thoursted, Phillip Grill, J. P. Jones, George Lashus, Richard Slater, James Thompson, E. N. Williams, M. O. Johnson, good and lawful men, residents of the first judicial district, who, being legally empaneled and sworn well and truly to try the cause, sat together and heard the testimony of the witnesses in part,
16 and the further trial of the cause is adjourned until to-morrow morning at 10 o'clock.

ORLANDO W. POWERS, *Judge.*

In open court, Monday January 4th, A. D. 1886.

The jury heretofore empaneled in this cause again sat together and heard the testimony of the witnesses in conclusion, the arguments of counsel, and the instructions of the court, retired from the bar of the court in charge of a sworn officer to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and on their oaths say: "We, the jury empaneled in the above-entitled cause, find the defendant, Lorenzo Snow, guilty, as charged in the indictment."

Whereupon the court fixes Saturday, January 16th, 1886, as time for passing sentence.

ORLANDO W. POWERS, *Judge.*

EXHIBIT J.

Verdict of Jury.

In open court, Tuesday, January 5th, A. D. 1886.

(Title of court and cause.)

We, the jury empaneled in the above-entitled cause, find the defendant, Lorenzo Snow, guilty, as charged in the indictment.

Ogden City, Utah, Jan. 5, 1886.

M. O. JOHNSON, *Foreman.*

Endorsed: No. 743. Filed January 5th, 1886. A. C. Emerson, clerk.

EXHIBIT K.

17 *Indictment.*

UNITED STATES OF AMERICA, }
Territory of Utah, } *ss:*

At a stated term of the district court of the first judicial district in and for the Territory of Utah, begun and holden at the city of Ogden, within and for the district and Territory aforesaid, on the sixteenth day of November, A. D. 1885, and continued by adjournment to and including the second day of December, A. D. 1885.

UNITED STATES OF AMERICA *against* LORENZO SNOW.

The grand jurors of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empaneled and sworn, on their oaths do find and present that Lorenzo Snow, late of said district, in the Territory aforesaid, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-three, at the county of Box Elder, in the said district, Territory aforesaid, and within the jurisdiction of this court, and on divers other days and times thereafter, and continuously between said first day of January, A. D. 1883, and the thirty-first day of December, A. D. 1883, did then and there unlawfully live ond cohabit with more than one woman, to wit, with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H. Snow, Phœbe W. Snow, and Minnie Jensen Snow; and during all the period aforesaid, at the county rforesaid, he, the said Lorenzo Snow, did unlawfully claim, live, and cohabit with all of said women as his wives, against the form of the statute of the said United States in such case
18 made and provided, and against the peace and dignity of the same.

V. BIERBOWER,
Ass't U. S. District Att'y.

J. W. McNUTT,
Foreman of Grand Jury.

Indictment No. 741. Filed in open court, properly endorsed a true bill, etc., and with the names of the witnesses, on the 5th day of December, 1885.

EXHIBIT L.

Court Minute Entry of Arraignment.

(Title of court and cause.)

In this action, the defendant being in court, and upon the indictment herein being read to him was, on motion of R. K. Williams, Esq., of counsel for said defendant, given until Monday morning next to plead thereto.

ORLANDO W. POWERS, *Judge.*

EXHIBIT M.

Defendant's Plea.

In open court, Friday, December 11th, 1885.

(Title of court and cause.)

This cause came regularly on to be heard upon the demurrer of the defendant to the indictment herein. Said demurrer was argued by counsel, R. K. Williams, for said defendant, and V. Bierbower, Esq., assistant United States attorney, for the Government, and submitted to the court for judgment and decision; and the court, now here being fully advised in the premises, and due deliberation being thereupon had, it is ordered by the court that said demurrer be, and the same is hereby, overruled; to which order and ruling the court the said defendant, by his said counsel, duly excepts.

19 Said defendant, upon being asked to plead to said indictment, pleads not guilty thereto.

ORLANDO W. POWERS, *Judge.*

EXHIBIT N.

Plea of Former Conviction and Court. Minutes of Trial.

In open court, Wednesday, December 16, 1885.

(Title of court and cause.)

This cause came regularly on for trial, V. Bierbower, Esq., appearing for the United States and Messrs. Bennett, Harkness & Kirkpatrick, F. S. Richards, C. C. Richards, and H. H. Rolapp for said defendant.

By leave of court first had and obtained the said defendant makes the following oral plea in bar to the further prosecution of this indictment.

And now comes the said defendant, and protesting he is not guilty of the premises charged, and by leave of court, for a further plea herein, saith that the United States ought not to further prosecute the said indictment against him, the said Lorenzo Snow, because that since his former plea herein he has been twice convicted for the same offence charged in this indictment by the judgments of this court, to wit, the district court of the first judicial district of the Territory of Utah, rendered at the city of Ogden, in the county of Weber, on the thirty-first day of December, 1885, and on the fifth day of January, 1886, respectively—that is, on the days and at the place and in the court aforesaid, he was found guilty of the same offence charged in this indictment by the verdicts of two juries, which verdicts are unreversed and in full force.

20 And for a further specification of his plea the said defendant saith that the grand jury of this court for the November term thereof of the year 1885, duly empaneled, charged, and sworn, to enquire of offences against the United States within the jurisdiction of this court, on the fifth day of December, 1885, presented and

filed in this court, in due form, three indictments against this defendant in words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
Territory of Utah, }

At a stated term of the district court of the first judicial district in and for the Territory of Utah, begun and holden at the city of Ogden, within and for the district and Territory aforesaid, on the sixteenth day of November, A. D. 1885, and continued by adjournment to and including the second day of December, A. D. 1885.

UNITED STATES OF AMERICA *against* LORENZO SNOW.

The grand jurors of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empaneled and sworn, on their oaths do find and present that Lorenzo Snow, late of said district, in the the Territory aforesaid, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-three, at the county of Box Elder, in the said disiriet, Territory aforesaid, and within the jurisdiction of this court, and on divers other days and times thereafter, and continuously between said first day of January, A. D. 1883, and the thirty-first day of December, A. D. 1883, did then and there unlawfully live and cohabit with more than one woman, to wit,
21 with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H. Snow, Phœbe W. Snow, and Minnie Jensen Snow; and during all the period aforesaid, at the county aforesaid, he, the said Lorenzo Snow, did unlawfully claim, live, and cohabit with all of said women as his wivesa, gainst the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same.

V. BIERBOWER,
Ass't U. S. Dis. Attorney.

J. W. McNUTT,
Foreman of Grand Jury.

Endorsed: No. 741. First district court, Territory of Utah. The United States of America against Lorenzo Snow. Indictment for unlawful cohabitation. A true bill. J. W. McNutt, foreman of grand jury.

Presented in open court by the foreman of the grand jury and filed by me this fifth day of December, 1885.

A. C. EMERSON, *Clerk.*

V. BIERBOWER,
Asst. U. S. Attorney.

Witnesses examined before the grand jury: C. J. Corey, Lucius A. Snow, Minnie Jensen Snow, Nellie Hansen, Nellie Colebrook, D. H. Peery, Mary Houtz Snow, Eleanor Snow, Harriet A. Snow, Mrs. Lorenzo Snow, Jr., Amelia Hansen, Emma Josephsen, John F. Olsen, Maria Nichols, Frank H. Snow, Dr. J. B. Carrington.

UNITED STATES OF AMERICA, } ss:
Territory of Utah. }

At a stated term of the district court of the first judicial district in and for the Territory of Utah, begun and holden at the city of Ogden, within and for the district and Territory aforesaid, on the sixteenth day of November, A. D. 1885, and continued by adjournment to and including the second day of December, A. D. 1885.

22

UNITED STATES OF AMERICA *against* LORENZO SNOW.

The grand jurors of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empaneled and sworn, on their oaths do find and present that Lorenzo Snow, late of said district, in the Territory aforesaid, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-four, at the county of Box Elder, in the said district, Territory aforesaid, and within the jurisdiction of this court, and on divers other days and times thereafter and continuously between said first day of January, A. D. 1884, and the thirty-first day of December, A. D. 1884, did then and there unlawfully live and cohabit with more than one woman, to wit, with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H. Snow, Phœbe W. Snow, and Minnie Jensen Snow, and during all the period aforesaid, at the county aforesaid, he, the said Lorenzo Snow, did unlawfully claim, live, and cohabit with all of said women as his wives, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same.

V. BIERBOWER,
Asst. U. S. Dist. Attorney.

J. W. McNUTT,
Foreman of Grand Jury.

Endorsed: No. 743. First district court, Territory of Utah. The United States of America against Lorenzo Snow. Indictment for unlawful cohabitation. A true bill. J. W. McNutt, foreman of grand jury.

23

Presented in open court by the foreman of the grand jury and filed by me this fifth day of December, 1885.

A. C. EMERSON, *Clerk.*

V. BIERBOWER.
Ass't U. S. Attorney.

Witnesses examined before the grand jury: C. J. Corey, Lucius A. Snow, Minnie Jensen Snow, Nellie Hansen, Nellie Colebrook, D. H. Peery, Mary Houtz Snow, Eleanor Snow, Harriet A. Snow, Mrs. Lorenzo Snow, Jr., Amelia Hansen, Emma Josephsen, John F. Olsen, Maria Nichols, Frank H. Snow, Dr. J. B. Carrington.

UNITED STATES OF AMERICA, }
Territory of Utah, } *ss*:

At a stated term of the district court of the first judicial district, in and for the Territory of Utah, begun and holden at the city of Ogden, within and for the district and Territory aforesaid, on the sixteenth day of November, A. D. 1885, and continued by adjournment to and including the second day of December, A. D. 1885.

UNITED STATES OF AMERICA *against* LORENZO SNOW.

The grand jurors of the United States of America within and for the district aforesaid, in the Territory aforesaid, being duly empaneled and sworn, on their oaths do find and present that Lorenzo Snow, late of said district, in the Territory aforesaid, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-five, at the county of Box Elder, in the said district, Territory aforesaid, and within the jurisdiction of this court, and on divers other days and times thereafter, and con-
24 tinuously between said first day of January, A. D. 1885, and the first day of December, A. D. 1885, did then and there unlawfully live and cohabit with more than one woman, to wit, with Adeline Snow, Sarah Snow, Harriet Snow, Eleanor Snow, Mary H. Snow, Phœbe W. Snow, and Minnie Jensen Snow, and during all the period aforesaid he, the said Lorenzo Snow, did unlawfully claim, live, and cohabit with all of said women as his wives, against the form of the statute of the said United States in such case made and provided, and against the peace and dignity of the same.

V. BIERBOWER,
Asst. U. S. District Attorney.

J. W. McNUTT,
Foreman of Grand Jury.

Endorsed: No. 742. First district court, Territory of Utah. The United States of America against Lorenzo Snow. Indictment for unlawful cohabitation. A true bill. J. W. McNutt, foreman of grand Jury.

Presented in open court by the foreman of the grand jury and filed by me this fifth day of December, 1885.

A. C. EMERSON, *Clerk.*

V. BIERBOWER,
Asst. U. S. Attorney.

Witnesses examined before the grand jury: C. J. Corey, Lucius A. Snow, Minnie Jensen Snow, Nellie Hansen, Nellie Colebrook, D. H. Peery, Mary Houtz Snow, Eleanor Snow, Harriet A. Snow, Mrs. Lorenzo Snow, Jr., Amelia Hansen, Emma Josephsen, John F. Olsen, Maria Nichols, Frank H. Snow, Dr. J. B. Carrington.

That on the eleventh day of December, 1885, this defendant was arraigned in this court on each of said indictments, and on the sixteenth day of December, 1885, pleaded not guilty to each of said indictments and to the alleged offence charged in each.

25 That said three indictments were all found for unlawful cohabitation against the defendant upon the testimony of witnesses examined before said grand jury on one oath and one examination, as to the alleged offence during the entire time mentioned in all of said three indictments, and upon the testimony of witnesses given on an examination covering the whole time specified in said three indictments.

That on the thirtieth day of December, 1885, this defendant was first put upon his trial in this court, before the court and a jury duly empaneled, sworn and charged to try the issue presented by the third of said indictments, to wit: The indictment charging unlawful cohabitation from the first day of January to the first day of December, 1885, and the plea aforesaid thereto, and such proceedings were had therein that on the thirty-first day of December, 1885, the said jury rendered in this court a verdict of guilty against the defendant, in manner and form as charged in said third indictment, and said verdict is of record in this court, and not set aside or in anywise impeached or reversed.

That on the fourth day of January, 1886, the defendant was put upon his trial in this court before the court and a jury duly empaneled, sworn, and charged to try the issue presented by the second of said indictments, to wit: The indictment charging unlawful cohabitation from the first day of January, 1884, to the thirty-first day of December, 1884, and the plea aforesaid thereto, and such proceedings were had therein that on the fifth day of January, 1886, the said jury rendered in this court a verdict of guilty against this defendant, in manner and form as charged in said second indictment, and said verdict is of record in this court, and not set aside or in anywise impeached or reversed.

26 And the defendant saith that he is the identical person charged in all said three indictments, and the offence charged in all said inctments is one continuous offence and the same offence, and not divisible, and he prays judgment that he be discharged and dismissed from the premises in the indictment to which this plea is made.

To which said plea of defendant the said United States assistant district attorney orally demurs for the reason and on the grounds that said plea does not state facts sufficient in law to be a bar to the further prosecution of this indictment, which said demurrer to said plea is submitted to the court for decision.

And the court now here, being fully advised in the premises, does consider that said demurrer and the grounds therein stated is well taken, and that the same ought to be sustained, and the court does order that the said demurrer be, and the same is hereby, sustained; to which ruling and order of the court said defendant, by his counsel, duly expects. Said defendant then being in court ready for trial, thereupon came the following jury, to wit: John R. Brown, Charles Blackwell, John Wheeler, John McDonald, E. N. Williams, William Lund, James Thompson, John Huss, W. H. Wattis, Alexander Bowman, Walter Holbrook, George Corey, good and lawful men, residents of the first judicial district, who being duly em-

paneled and sworn well and truly to try the cause, sat together and heard the testimony of the witnesses in the case. And said cause being submitted without argument of counsel, said jury heard the instructions of the court, retired from the bar of the court in charge of a sworn officer to consider their verdict, and subsequenty returned into court, and being called answered to their names and on
27 their oaths say: "We, the jury empaneled in the above-entitled cause, find the defendant, Lorenzo Snow, guilty as charged in the indictment."

Whereupon the court fixes Saturday, January 16th, at 10 o'clock a. m., as time for passing sentence.

ORLANDO W. POWERS, *Judge.*

EXHIBIT O.

Verdict of Jury.

In open court, Tuesday, January 5th, A. D. 1886.

(Title of court and cause.)

We, the jury empaneled in the above-entitled cause, find the defendant, Lorenzo Snow, guilty as charged in the indictment.

Ogden city, Utah, Jan., 1886.

W. S. HOLBROOK, *Foreman.*

Endorsed: No. 741. Filed January 5th, 1886. A. C. Emerson, clerk.

EXHIBIT P.

Judgments on Indictments Nos. 741, 742, 743 *for Offences of the Years* 1883, 1885, *and* 1884, *Respectively.*

(Title of court and cause.)

The defendant and his counsel, F. S. Richards and C. C. Richards, Esq'rs (of counsel), came into court. The defendant was duly informed of the nature of the indictments found against him on the 5th day of December, A. D. 1885, by the grand jury of this court for the crime of unlawful cohabitation committed, as stated in said indictments and during the time as follows, viz: Indictment No. 741, between the first day of January, A. D. 1883, and the
28 thirty-first day of December, A. D. 1883; indictment No. 742, between the first day of January, A. D. 1885, and the first day of December, A. D. 1885; indictment No. 743, between the first day of January, A. D. 1884, and the thirty-first day of December, A. D. 1884; of his arraignment and plea of not guilty, as charged in said three indictments, on the sixteenth day of December, A. D. 1885; of his trial and the verdicts of the juries; indictment No. 742, "Guilty as charged in the indictment" on December 31, 1885; indictment No. 742, "Guilty as charged in the indictment" on January 5, 1886; indictment No. 741, "Guilty as charged in the indictment" on January 5, 1886.

The said defendant was then asked if he had any legal cause to

show why judgment should not be pronounced against him, to which he replied that he had none; and no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment, that whereas said Lorenzo Snow having been duly convicted in this court of the crime of unlawful cohabitation:

It is ordered, adjudged, and decreed that said Lorenzo Snow be imprisoned in the penitentiary of the Territory of Utah for a period of six months, and that he do forfeit and pay to the United States a fine of three hundred dollars and the costs of this prosecution, and that he do stand committed into the custody of the U. S. marshal for said Territory until such fine and costs be paid in full. (As to indictment No. 741.)

And it is further ordered, adjudged, and decreed that at the expiration of the sentence and judgment rendered on said indictment No. 741 said Lorenzo Snow be imprisoned in the penitentiary of Utah Territory for a period of six months, and that he do forfeit and pay to the United States the sum of three hundred dollars and the costs of this prosecution, and that he do stand committed
29 into the custody of the U. S. marshal for said Territory until such fine and costs be paid in full. (As to indictment No. 742.)

And it is further ordered, adjudged, and decreed that at the expiration of the sentence and judgment, as last above rendered, on said indictment No. 742, said Lorenzo Snow be imprisoned in the penitentiary of Utah Territory for a period of six months, and that he do forfeit and pay to the United States the sum of three hundred dollars and the costs of this prosecution, and that he do stand committed into the custody of the U. S. marshal for said Territory until such fine and costs be paid in full. (As to indictment No. 743.)

The said defendant, Lorenzo Snow, is remanded into the custody of the United States marshal for Utah Territory, to be by him delivered into the custody of the warden or other proper officer in charge of said penitentiary; and said warden or other proper officer of said penitentiary is hereby commanded to receive of and from the said United States marshal him, the said Lorenzo Snow, convicted and sentenced as aforesaid, and him, the said Lorenzo Snow, keep and imprison in said penitentiary for the periods as in this judgment ordered and specified.

ORLANDO W. POWERS, *Judge.*

In open court, Saturday, January 16, A. D. 1886.
Filed October 22nd, 1886.

J. M. ZANE, *Clerk,*
By M. G. McMILLAN,
Deputy Clerk.

30 *Order.*

In the District Court for the Third Judicial District of Utah Territory.

In the Matter of the Application of LORENZO SNOW for a Writ of *Habeas Corpus.*

The petition of Lorenzo Snow for a writ of *habeas corpus* having been presented to the court, with the exhibits attached as a part thereof, and the court having fully considered the application and petition and the exhibits attached, finds that the facts alleged and shown by the petition and exhibits are insufficient to authorize the issuance of the writ, and the court being of the opinion from the allegations and facts stated in the petition and exhibits that if the writ be granted and a hearing given that the petitioner could not be discharged from custody, it is ordered and adjudged by the court that the said application for a writ of *habeas corpus* be, and the same is hereby, refused; to which ruling and refusal applicant, by his counsel, excepts.

Dated Oct. 23d, 1886.

By the court:

C. S. ZANE, *Judge.*

Filed October 23d, 1886.

J. M. ZANE, *Clerk,*
By M. G. McMILLAN,
Deputy Clerk.

31 In the District Court for the Third Judicial District of Utah Territory.

In the Matter of the Application of LORENZO SNOW for a Writ of *Habeas Corpus.*

On motion of Ben. Sheeks, Esq., on behalf of petitioner to be allowed an appeal to the Supreme Court of the United States from the order made herein on the 23d instant, and for an order fixing the amount of the undertaking upon such appeal, it is ordered that the petitioner be allowed to appeal herein, and that the appeal be allowed upon an undertaking in the sum of three hundred dollars. Filed and approved.

Dated October 25th, 1886.

By the court:

C. S. ZANE, *Judge.*

Filed October 25th, 1886. J. M. ZANE, *Clerk.*

32 *Bond.*

Know all men by these presents that we, George F. Gibbs and Robert R. Anderson, of the city and county of Salt Lake, in the Territory of Utah, are held and firmly bound unto Frank H. Dyer, United States marshal in and for said Territory, in the full and just sum of three hundred dollars, to be paid to the said Dyer, his cer-

tain attorney, executor, administrator, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of November, A. D. 1886.

Whereas at a term of the district court of the third judicial district in the Territory of Utah, in a suit depending in said court between Lorenzo Snow and Frank H. Dyer, United States marshal as aforesaid, upon an application for a writ of *habeas corpus*, judgment was rendered against the said Lorenzo Snow, and the said Snow having in open court at said term obtained the allowance of an appeal from said judgment of said district court to the Supreme Court of the United States:

Now, the condition of the above obligation is such that if the said Lorenzo Snow shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his said plea good, then the above obligation to be void; else to remain in full force and virtue.

GEO. F. GIBBS. [SEAL.]
R. R. ANDERSON. [SEAL.]

Sealed and delivered in presence of—
J. L. RAWLINS.

Approved by—
C. S. ZANE, *Judge.*

Filed Nov. 1st, 1886.

J. M. ZANE, *Clerk.*

TERRITORY OF UTAH, }
County of Salt Lake, } *ss:*

I, John M. Zane, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original petition of Lorenzo Snow for a writ of *habeas corpus*, with the Exhibits "A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, and P" thereto attached and made a part thereof; also order refusing the writ, order allowing the appeal to the Supreme Court of the United States and fixing the amount of bond and the undertaking on appeal approved by this court in the above-entitled action filed in my office.

Witness my hand and the seal of said court, at Salt Lake city, this second day of November, A. D. 1886.

[Seal of 3d District Court, Territory of Utah, United States of America.]

JOHN M. ZANE, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

Endorsed on cover: Utah Territory third judicial district court, Salt Lake county. No. 1282. *Ex parte* in the matter of Lorenzo Snow, petitioner, appellant. Filed November 10, 1886.

120-274

Supreme Court of the United States.

OCTOBER TERM, 1886. No. 1282.

Ex parte: **In the Matter of LORENZO SNOW, Petitioner, Appellant.**

Appeal from the 3d Judicial District Court, Salt Lake County, Territory of Utah.

Appellant, by his counsel, moves to advance this cause, under Rule 26, sub-division 3, and that it be assigned for argument at some date soon after January 15th, 1887.

The record shows that this is a criminal case; that Appellant is in confinement in the Penitentiary of Utah Territory, under one sentence imposing three fines and three imprisonments, inflicted for alleged successive violations of the 3d section of an act of Congress passed March 22d, 1882, entitled "An act to amend section fifteen hundred and fifty two, of the Revised Statutes of the United States, in reference to bigamy, and for other purposes."

That on the 21st of October, 1886, Appellant by petition applied to the 3d Judicial District Court, Salt Lake County, Territory of Utah, to issue a writ of habeas corpus to bring him be-

fore the said Court, for inquiry into the legality of the sentence and the continuous imprisonments; that the said Court refused to grant the writ upon the ground that the facts alleged and shown by the petition and the exhibits are insufficient to authorize the issue of the writ, and because the said Court was of opinion from the allegations and facts stated in the petition and exhibits, that if the writ be granted and a hearing given, the petitioner could not be discharged from custody.

Appellant, by his counsel, excepted to this refusal and appealed to this court, which appeal was allowed. The appeal is claimed under section 1909 of the Revised Statutes, and under other laws The record has been printed.

For the Appellant,

GEO. TICKNOR CURTIS.

WASHINGTON, D. C.

Nov. 22d, 1886.